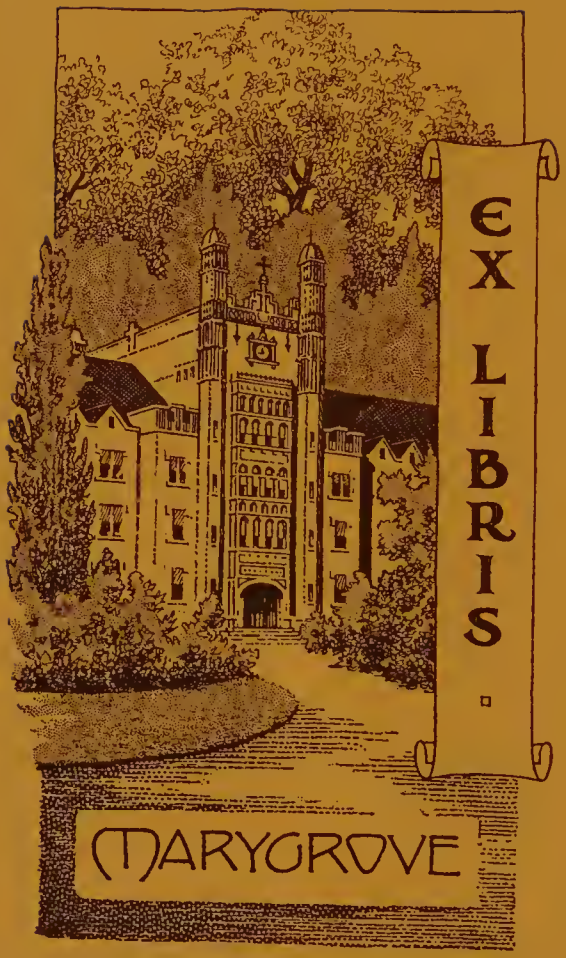
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SELECTED ARTICLES ON

# LAW ENFORCEMENT

COMPILED BY
JULIA E. JOHNSEN

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Adams, James T. Hoover and Law Observance ..
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Lukens, Edward C. Prohibition and Nullification .....American Bar Association. Journal 344

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# EXPLANATORY NOTE

Law enforcement, in the light of the intensely agitated prohibition controversy and the widespread crime conditions, has become one of the vital topics of the day. The aim of this volume has been to indicate some of its leading phases and discussions. In keeping with the established policy of the Handbook Series the subject is presented without bias, with the endeavor to accord representation fairly to all sides so far as space and available material permit. The possibilities of so far-reaching a subject can be touched upon in only a few of its aspects, but it has been the aim to indicate the best and most intrinsically helpful material. Part I treats of the law, its nature, functions, limitations and social aspects. Some of the historical roots and current tendencies of lawlessness are touched upon, and the plethora of laws with which we are inflicted, whether wisely or unwisely, is indicated. In Part II some of the faulty conditions in the administrative and judicial departments of government and in public life are touched upon, conditions which, fostering resentment against injustice, corruption, inefficiency, high-handedness, undue stress on technicalities, and other evils and abuses, contribute to the disrespect for and revolt against law and those representing it. A few remedial suggestions are included. In Part III has been included representative discussion from those urging support of and obedience to law, and from those counseling the non-observance or nullification of unpopular laws. Part IV contains a limited discussion of prohibition, which aspect, to many, is the heart of the "law enforcement" controversy. For a broader and more complete discussion of this phase the reader is referred to the Handbook and the Reference Shelf

on *Prohibition* by Lamar T. Beman. The phases outlined in this volume can be indicated by only a few of many possible aspects, and by a selected bibliography of some of the best and more recent material. The reader desiring to follow up the subject more completely is referred to material pointed out in the bibliography, as well as to current periodical indexes for the latest developments and discussions.

JULIA E. JOHNSEN

March 4, 1930

# BIBLIOGRAPHY

An asterisk (*) preceding a reference indicates that the article or a part of it has been reprinted in this volume.


### Bibliographies

United States. Library of Congress. List of references on respect for law, including public opinion as an aid to enforcement. 5p. mim. Wash., D.C. Mr. 4, '22.

### Law

#### Books and Pamphlets

*American Bar Association. Report, 1907:444-62. Influence of national character and historical environment on the development of the common law. James Bryce.

*Same.* Canadian Law Times and Review. 28:89-107. F. '08.

American Bar Association. Report, 1922:270-7. Limitations of law. Calvin Coolidge.

American Bar Association. Report, 1928:587-99. Judge-made law; an appreciation. William M. Lile.

Bacon, Charles W. and Morse, Franklyn S. Reasonableness of the law: the adaptability of legal sanctions to the needs of society. 400p. G. P. Putnam's Sons. N.Y. '24.

Burgess, John W. Reconciliation of government with liberty. 394p. Charles Scribner's Sons. N.Y. '15.

Burgess, John W. Sanctity of law: wherein does it consist. 335p. Ginn & Co. N.Y. '27.

Cardozo, Benjamin N. Growth of the law. 145p. Yale Univ. Press. New Haven. '24.

Cardozo, Benjamin N. Paradoxes of legal science. 142p. Columbia University. N.Y. '28.

Cohen, Herman. Origins of order and law. 86p. Effingham Wilson. Lond. '23.

*Colorado Bar Association. Report, 1928:97-112. Reign of law. Donald C. McCreery.

Comer, John P. Legislative functions of national administrative authorities. 274p. Columbia Univ. Studies in History, Economics and Public Law, No. 289. Columbia Univ. N.Y. '27.

Corliss, John B. Jr. Peace versus politics. 109p. Utopia Press. Detroit. '28.

Dealey, James Q. State and government. 409p. D. Appleton & Co. N.Y. '21

Dickinson, John. Administrative justice and the supremacy of law in the United States. 403p. Harvard Univ. Press. Cambridge. '27.

Fairchild, Henry P. Crime. *In* his Foundations of social life. p. 245-9. John Wiley & Sons. N.Y. '27.

Garner, James W. Province of government. *In* his Political science and government. p. 446-97. American Book Co. N.Y. '28.

Gettell, R. G. Law: nature, sources, divisions and ethics. *In* his Readings in political science. p. 174-94. Ginn & Co. N.Y. '11.

Gray, John C. Nature and sources of the law. 348p. Macmillan. N.Y. '21.

Hadley, Arthur T. Freedom and responsibility in the evolution of democratic government. 174p. Charles Scribners' Sons. N.Y. '07.

Hetherington, Hector J. W. and Muirhead, J. H. Social purpose: a contribution to a philosophy of civic society. 317p. Macmillan. N.Y. '18.

Hobhouse, Leonard T. Law and justice. *In* Steeves, Harrison R. and Ristine, Frank H. Representative essays in modern thought. p. 341-75. American Book Co. N.Y. '13.

*Indiana State Bar Association. Proceedings, 1922:41-53. Supremacy of the law. Charles M. McCabe.

Krabbe, Hugo. Modern idea of the state. 281p. D. Appleton & Co. N.Y. '22.

Logan, George B. Jr. Liberty and law. *In* his Liberty in the modern world. p. 14-29. University of North Carolina Press. Chapel Hill. '28.

National Conference of Social Work. Proceedings, 1926: 76-91. Law and social progress. M. B. Rosenberry.

Ohio State Bar Association. Proceedings. 1915:94-111. Making law and finding law. Roscoe Pound.

Platt, Charles. Law. *In* his Riddle of society. p. 141-69. E. P. Dutton & Co. N.Y. '26.

Pound, Roscoe. Introduction to the philosophy of law. 307p. Yale Univ. Press. New Haven. '22.

Pound, Roscoe and Plucknett, Theodore F. T. Readings on the history and system of the common law. 731p. Lawyers Co-operative Pub. Co. Rochester. '27.

*Root, Elihu. Citizen's part in government. *In* his Addresses on government and citizenship. p. 3-19. Harvard Univ. Press. Cambridge. '16.

Russell, Bertrand. Government and law. *In* his Roads to freedom. p. 121-45. George Allen and Unwin. Lond. '18.

Russell, Bertrand. Individual liberty and public control. *In* his Political ideals. p. 105-41. Century Co. N.Y. '17.

Stammler, Rudolf. Theory of justice. 589p. Macmillan. N.Y. '25.

Stimson, Frederic J. Popular law-making: a study of the origin, history and present tendencies of law-making by statute. 390p. Charles Scribner's Sons. N.Y. '10.

Stone, Harlan F. Law and its administration. 232p. Columbia Univ. Press. N.Y. '15.

Vinogradoff, Paul. Outlines of historical jurisprudence. 2v. Oxford Univ. Press. Lond. '22.

West Virginia Bar Association. Proceedings. 1915:187-201. Law and morals. Roscoe Pound.

Wigmore, John H. Problems of the law's mechanism in America. *In* his Problems of law. p. 65-101. Charles Scribner's Sons. N.Y. '20.

Willoughby, Westel W. Fundamental concepts of public law. 499p. Macmillan Co. N.Y. '24.

Willoughby, William F. Enforcement. *In* his Principles of judicial administration. p. 91-208. Brookings Institution. Wash., D.C. '29.

Wisconsin State Bar Association. Proceedings, 1923: 137-61. Growing disrespect for law and the remedy. William F. Shea.

Zane, John M. Story of law. 486p. Ives Washburn. N.Y. '27.

PERIODICALS

*American Bar Association. Journal. 9:115-23. F. '23. Law and order in industrial disputes. Charles T. Terry.

American Bar Association. Journal. 9:377-9. Je. '23. Our inheritance of law. Andrew A. Bruce.

American Law Review. 45:25-46. Ja. '11. Growing disrespect for the law. E. M. Grossman.

American Law Review. 48:365-76. Mr. '13. Respect for the law. Frank L. Fisk.

American Law Review. 47:641-7. S. '13. Law-making forces. William M. Blatt.

American Law Review. 48:641-75. S. '14. Law of the land. Oliver H. Dean.

American Law Review. 57:682-93. S. '23. Limitations of law. Calvin Coolidge.

American Law Review. 59:361-92. My. '25. History of law. C. Guy Cutlip.

American Law Review. 59:932-9. N. '25. Abuse of law. Young B. Smith.

American Law Review. 61:357-87. My. '27. Economics, the basis of law. Mark M. Litchman.

American Law Review. 61:509-34. Jl. '27. Frontiers of the law. Carrington T. Marshall.

Atlantic Monthly. 138:1-11. Jl. '26. Liberty and sovereignty. George W. Martin.

Boston University Law Review. 4:83-93. Ap. '24. Idealism in the law. Arthur P. Rugg.

Boston University Law Review. 9:19-28. Ja. '29. Law of civilization. Edward A. Harriman.

Canadian Law Times. 41:49-56. Ja. '21. Origin and development of law and government. Walter Clark.

Catholic World. 128:224-5. N. '28. Civil law binds the conscience. John A. Ryan.

*Columbia Law Review. 27:237-50. Mr. '27. Positivism and the limits of idealism in the law. Morris R. Cohen.

Congressional Record. 69:5236-8. Mr. 22, '28. Common law. Ernest C. Butler; Civil law. Nathan G. Foster; Equity. Charles V. Holman.

Golden Book. 3:411-14. Mr. '26. What law can do; selections.

International Journal of Ethics. 27:317-33. Ap. '17. Individual conscience and the law. Emile Boutroux.

International Journal of Ethics. 30:349-71. Jl. '20. Attack on the state. Norman Wilde.

Journal of Comparative Legislation. 5:169-77. N. '23. Function of law in society. Edward Jenks.

Law Notes. 26:51-2. Je. '22. Public opinion and the enforcement of law.

Methodist Review. 107:92-100. Ja. '24. Pulpit and the law. Ralph W. Sockman.

Nation. 108:343. Mr. 8, '19. Reverence for law.

*New York University Law Review. 4:120-5. Ap. '27. Law and social development. Jacob Panken.

Outlook. 99:941-3. D. 23, '11. Is there a higher law?

Outlook. 152:61. My. 8, '29. Discipline and freedom. A. G. Kellar.

Popular Science Monthly. 85:87-92. Jl. '14. Bad habit of having law makers and lawyers. John C. Dana.

Scribner's Magazine. 80:157-61. Ag. '26. Sense of law. Struthers Burt.

Texas Law Review. 45:63-72. O. '26. Progress and development of the law. E. A. McCulloch.

*University Journal of Business. 3:350-77. S. '25. Law and economic life. J. M. Clark.

University of Chicago Magazine. 2:1-15. N. '09. Our common humanity and the common law. Emlin McClain.

Yale Law Review. 34:60-9. N. '24. Foundations of a theory of rights. Paul Vinogradoff.

## Lawlessness

### Books, Pamphlets and Documents

*American Bar Association. Report, 1921:167-89. Spirit of lawlessness. James M. Beck.

American Year Book. 1927:432-5. Crime conditions in the United States. Bennet Mead.

Illinois Association for Criminal Justice. Illinois crime survey. 1108p. Chic. '29.

Illinois State Bar Association. Proceedings, 1914:319-48. Enforcement of law. Robert McMurdy.

Landesco, John. Observations on the survey of organized crime in Chicago. 14p. mim. Institute of Public Affairs, Charlottesville, Va. Ag. 6, '29.

Law, Alfred M. Why the people have a contempt for law. *In* his American people, a study of national psychology. v. 2. p. 329-59. Houghton Mifflin Co. Bost. '11.

New York State. Crime Commission. Report, 1929. 63p. Albany. '29.

Orebaugh, David A. Crime, degeneracy and immigration: their interrelations and interactions. 272p. Richard G. Badger. Bost. '29.

Robertson, A. T. Order versus lawlessness. *In* his New citizenship. p. 120-33. Fleming H. Revell Co. N.Y. '19.

Smith, Fred B., ed. Law versus lawlessness: addresses delivered at the Citizenship conference, Washington, D.C., Oct. 13-15, 1923. 186p. Fleming H. Revell. N.Y. '24.

Webb, Atticus. Crime our national shame. 345p. Vail-Ballou Press. N.Y. '24.

Wisconsin State Bar Association. Proceedings, 1925: 131-54. Lawlessness and law observance. William D. Thompson.

PERIODICALS

American Institute of Criminal Law and Criminology. 19, pt. 2:1-109 F. '29. Administration of criminal justice in Illinois: a summary of the crime survey of the Illinois association for criminal justice. Andrew A. Bruce.

American Journal of Sociology. 18:77-91. Jl. '12. American lawlessness; an inquiry. Victor S. Yarros.

American Journal of Sociology. 34:1108-13. My. '29. Crime. C. E. Gehlke.

Atlantic Monthly. 142:732-40. D. '28. Our lawless heritage. James T. Adams.

Boston City Club Bulletin. 11:129-41. Ja. 1, '17. Lawlessness. Moorfield Storey.

Century. 80:311-13. Je. '10. Lawlessness the national vice.

*Century. 116:691-8. O. '28. Our ingrowing habit of lawlessness. William E. Dodd.

*Same* condensed. Review of Reviews. 78:667-8. D. '28.

Century. 117:471-8. F. '29. If we really would lessen crime let us look to our gospel of materialism. H. Addington Bruce.

Consensus. 11:1-40. Je. '26. Lawlessness. Marcus Kavanaugh, Emory R. Buckner.

Current History. 15:753-61. F. '22. Carnival of crime in the United States. Charles F. Carter.

Current History. 23:1-8. O. '25. War on the growing menace of crime. Mark O. Prentiss.

Current History. 27:332-4. D. '27. American lawlessness a result of social conditions. Spencer Brodney.

Current History. 30:999-1006. S. '29. Crime as a profession. Raymond Moley.

Current Opinion. 77:15-18. Jl. '24. Shame of American lawlessness.

Editorial Research Reports Student Service. 1:10-11. My. '29. Border patrol and alien "bootlegging."

Golden Book. 5:781-7. Je. '27. Why we are lawbreakers; selections.

*Harpers Monthly Magazine. 153:535-44. O. '26. Crime and the alarmists. Clarence Darrow.

Harper's Monthly Magazine. 158:312-19. F. '29. Ladies and lawlessness. Duncan Aikman.

Harper's Monthly Magazine. 159:529-40. O. '29. High cost of hoodlums. John Gunther.

Journal of Applied Sociology. 10:1-5. S. '25. Carriers of criminality. Franklin H. Giddings.

Ladies' Home Journal. 40:23+. Jl. '23. Twelve tests of character: obedience. Harry E. Fosdick.

Literary Digest. 82:32-3. S. 13, '24. Most lawless nation in the world.

Literary Digest. 94:34. Ag. 6, '27. Warning for scofflaws.

Literary Digest. 102:22-3. Jl. 20, '29. Story of our national dishonor.

Magazine of Business. 55:405. Ap. '29. Crime and your balance sheet.

Meadville Theological School Quarterly Bulletin. 20: 3-15. Je. '26. Problem of crime in the United States. Robert J. Hutcheon.

Minnesota Law Review. Sup. 11:1-77. Ja. '27. Report of the Minnesota crime commission.

National Municipal Review. 15:317-20. Je. '26. Crime and political corruption in Chicago. Victor S. Yarros.

New Republic. 58:166-8. Mr. 27, '29. Function of the racketeer. R. S. Duffus.

New York Times. pt. 5, p. 5, 17. My. 26, '29. Our lawlessness that alarms Hoover. George W. Kirchwey.

North American Review. 228:385-91. O. '29. Our biggest business—crime. Richard E. Enright.

North American Review. 228:609-15. N. '29. Four billions in easy money. Howard McLellan.

Outlook. 131:16-17. My. 3, '22. Crime wave and law enforcement. George S. Buck.

Review of Reviews. 80:64-5. Jl. '29. Lawless American.

Saturday Evening Post. 198:6-7. Ag. 1, 20-1. Ag. 15, 18-19. Ag. 29, 32-3. S. 12, 6-7. S. 26, 26-7. O. 10, 24-5. O. 24, 29. O. 31, 32-3. N. 7, 30-1. N. 14, '25. Great American scandal. Richard W. Child.

Scientific Monthly. 24:415-38. My. '27. Crime and punishment.

South Atlantic Quarterly. 25:343-9. O. '26. Lawlessness as the American classical tradition. James M. Holzman.

United States Daily. 4:2362. N. 15, '29. Dangers to popular liberty in disregard of law. Clarence R. Martin.

*World's Work. 42:267-9. Jl. '21. Law and order. Charles H. Brent.

World's Work. 51:133-43. D. '25. Rising tide of crime. Lawrence Veiller.

## Laws

### Books

Alabama State Bar Association. Proceedings, 1927:81-93. Flirting with the law a perilous pastime. Fred Johnson.

Mencken, Henry L. Maker of laws. *In* his Notes on democracy. p. 122-9. Alfred A. Knopf. N.Y. '26.

### Periodicals

Academy of Political Science. Proceedings, 2:285-9, 379-89. Ap. '12. Law enforcement; with discussion. John J. Murphy.

American Law Review. 54:91-108. Ja. '20. Grotesque in law. H. C. Shurtleff.

American Law Review. 60:362-73. My. '26. Hasty and local legislation. Harry R. Trusler.

American Law Review. 61:39-57. Ja. '27. State legislation that hurts. George C. Lay.

American Law Review. 61:311-16. Mr. '27. Blue laws, old and new. Leon Goodman.

American Magazine. 76:114-19. O. '13. Who is the other fellow?

American Magazine. 106:52-3. S. '28. You look 'em over, and, you obey your choice. William S. Dutton.

American Medical Association. Journal. 93:201-2. Jl. 20, '29. Address of President W. S. Thayer.

*American Mercury. 2:419-27. Ag. '24. Ordeal of prohibition. Clarence S. Darrow.

*Annals of the American Academy. 125:35-9. My. '26. Laws men break and why. Edwin M. Abbott.
*Same.* Scientific Monthly. 24:135-9. F. '27.

Annals of the American Academy. 136:48-53. Mr. '28. Some reflections on solving social problems by law. Theodore A. Johnson.
*Same.* Scientific Monthly. 24:135-9. F. '27.

Atlantic Monthly. 114:107-11. Jl. '14. Rain of law. William D. Parkinson.

Catholic World. 129:215-17. My. '29. This is a free country. Milton Colvin.
Central Law Journal. 67:141-2. Ag. 14, '08. Enforcement of obsolete laws.
Century. 117:60-6. N. '28. Great American delusion. H. Addington Bruce.
Collier's. 45:19-20. Ap. 30, '10. Law-abiding man. Elliott Flower.
Collier's. 80:46. Ag. 20, '27. Why we flout the laws we make.
Collier's. 80:19. O. 15, '27. There ought to be a law. Merle Thorpe.
Collier's. 83:58. Je. 1, '29. When the laws decay.
Collier's. 84:58. Jl. 13, '29. Open letter to Mr. Wickersham. W. L. Cheney.
Freeman. 7:604-5. S. 5, '23. Root of bitterness.
Harper's Monthly Magazine. 157:700-5. N. '28. Our passion for lawmaking. Katharine F. Gerould.
*Harvard Graduates' Magazine. 33:386-93. Mr. '25. Overproduction of laws. E. V. Wilcox.
Law Notes. 26:228-32. Mr. '23. Waning respect for law. Minor Bronaugh.
National Municipal Review. 18:565-7. S. '29. Where does legislation originate? Harvey Walker.
North American Review. 227:566-76. My. '29. Aren't we Volsteadizing the anti-trust laws? James H. Williams.
Scientific Monthly. 24:119-25. F. '27. Should the tax laws be enforced and enforceable? Fred R. Fairchild.
*Yale Review. n.s. 15:433-47. Ap. '26. Law, liberty and progress. Henry W. Farnam.

### Responsibility, General

#### Books, Pamphlets and Documents

American Bar Association. Report, 1906:395-417. Causes of popular dissatisfaction with the administration of justice. Roscoe Pound.

American Law Institute. Proceedings, 1925:441-93. Report to the Council by the Committee on a survey and statement of the defects in criminal justice.

Child, Richard W. Battling the criminal. 290p. Doubleday, Page & Co. Garden City. '25.

Claghorn, Kate H. Immigrant's day in court. 546p. Harper and Bros. N.Y. '23.

Huntington, Ellsworth and Whitney, Leon F. Tide of crime. *In* their Builders of America. p. 88-110. William Morrow & Co. N.Y. '27.

*Illinois State Bar Association. Proceedings, 1927:306-20. Do we need a code of ethics for the public? Gveinbjorn Johnson.

McKinley, Michael L. Crime and the civic cancer—graft. 51p. Reprints No. 6. Chicago Daily News. Chic. '23.

Maryland State Bar Association. Report, 1924:3-41. Contempt of law. T. Scott Offutt.

Moley, Raymond. Administration of criminal justice in Missouri: a summary of the Missouri crime survey. 56p. Missouri Association for Criminal Justice. St. Louis. '26.

New York State Bar Association. Report, 1906:207-26. Disregard of law. Alphonso T. Clearwater.

Phelps, Edith M. ed. British criminal procedure. *In* University debaters' annual, 1928-1929, p. 71-129. H. W. Wilson Co. N.Y. '29.

Pound, Roscoe. Criminal justice in the American city. 94p. Cleveland Foundation, Survey of Criminal Justice in Cleveland. pt. 7. Cleveland. '22.

Russell, Bertrand. Free thought and official propaganda. *In* his Sceptical essays. p. 149-72. W. W. Norton & Co. N.Y. '28.

Russell, Charles E. Doing us good and plenty. 172p. Charles H. Kerr & Co. Chic. '14.

Ripley, William Z. Main street and Wall street. 359p. Little, Brown & Co. Bost. '27.

Ryan, John A. Declining liberty in America. *In* his Declining liberty and other papers. p. 3-42. Macmillan. N.Y. '27.

Sutherland, Edwin H. Criminology. 643p. J. P. Lippincott Co. Phila. '24.

Wiley, Harvey W. History of a crime against the food law. 413p. Author. 506 Mills Bldg. Wash., D.C. '29.

PERIODICALS

Academy of Political Science. Proceedings. 1:563-89. Jl. '11. Some consequences of unenforceable legislation. Howard S. Gans.

American Bar Association. Journal. 13:726-32. D. '27. Cause of the crime wave. John T. White.

American City. 41:94-5. D. '29. Law enforcement is in the hands of the average citizen. H. E. French.

American Federationist. 32:103-4. F. '25. Why the crime wave waves. Joseph A. Wise.

American Institute of Criminal Law and Criminology. Journal. 18:331-6. N. '26. Refuge for American criminals. Michael G. Heintz.

Arena. 35:532-5. My. '06. Exhibitions of brazen contempt for law.

Catholic Charities Review. 12:205-8. Je. '28. Some difficulties in administering immigration restriction. Frank Cavanaugh.

Christian Century. 45:1555-7. D. 20, '28. Respectable lawlessness. Robert Whitaker.

Christian Century. 47:328-30. Mr. 12, '30. Creating a red menace.

Collier's. 76:23. D. 5, '25. Who flouts our laws. Nellie T. Ross.

Current History. 27:320-31. D. '27. Difficulties in enforcing criminal law. John Knight; Criminal law enforcement in America and Europe. P. W. Wilson.

Forum. 82:271-5. N. '29. Combating crime. Clarence Darrow.

Harper's Monthly Magazine. 160:11-19. D. '29. Officialism and lawlessness. Albert J. Nock.

Harper's Monthly Magazine. 160:306-13. F. '30. Burglar looks at law and codes. Jack Black.

Illinois Bankers Association Bulletin. 6:19-22. Ja. 31, '25. Law enforcement. Floyd Thompson.

*Abstracts.* Institution Quarterly. 16:23-8. Mr. '25. Justice Thompson on law enforcement.

Independent. 115:503-4+. O. 31, '25. Terry teaches us a lesson in government. David E. Lilienthal.

Journal of Applied Sociology. 9:51-6. S. '24. Public opinion as a cause of crime. E. H. Sutherland.

Law Notes. 28:221-2. Mr. '25. Multiplication of regulations.

Nation. 129:480. O. 30, '29. Lobbying good and bad.

New Republic. 59:166-7. Jl. 3, '29. With unclean hands.

Outlook (London). 54:155-6. Ag. 30, '24. When governments dope justice.

Political Science Quarterly. 42:497-523. D. '27. Criminal law administration. Raymond Moley.

Sociology and Social Research. 13:526-35. Jl. '29. Social aspects of crime. Justin Miller.

Survey. 55:593-7, 602-4. Mr. 1, '26. Crime waves and crime remedies. George W. Kirchwey; Sieve of justice. Raymond Moley.

*Welfare Magazine. 18:1551-65. D. '27. Law enforcement: and how. Richard J. Finnegan.

World's Work. 51:355-7. F. '26. Enforcement of criminal law in Boston.

## The Legal System

### Books, Pamphlets and Documents

American Civil Liberties Union. Report upon the illegal practices of the United States Department of Justice. 67p. N.Y. My. '20.

Bancroft, Hubert H. Injustice of law. *In* his Retrospection. p. 250-67. Bancroft Co. N.Y. '12.

Bruce, Andrew Alexander. American judge. 218p. Macmillan. N.Y. '24.

Clancey, James H. Law and its sorrows: an exoteric of our legal wrongs. 317p. Bentham Institute. Detroit. '22.

Eliot, Charles W. Lawlessness. 28p. Civic Forum. N.Y. '08.

*Same.* Putman's. 6:82-92. Ap. '09.

Gigliotti, Cairoli. Toward the danger mark: administration of justice in the United States. 188p. Author. Chicago. '16.

Illinois State Bar Association. Proceedings, 1925:304-27. Law enforcement and the lawyer. Oscar E. Carlstrom; Lawyers' relation to law enforcement. Floyd E. Thompson, Marcus A. Kavanagh, Jesse L. Deck.

Irvine, Leigh H. Follies of the courts. 273p. Times-Mirror Press. Los Angeles. '25.

Kavanagh, Marcus. Criminal and his allies. 433p. Bobbs-Merrill Co. Indianapolis. '28.

Moley, Raymond. Politics and criminal prosecution. 241p. Minton, Balch & Co. N.Y. '29.

New York State. Crime Commission. Report to the commission of the sub-commission on courts. 30p. Albany. '29.

Ryan, John A. Injunction in labor disputes. *In* his Declining liberty and other papers. p. 203-8. Macmillan. N.Y. '27.

*Smith, Reginald H. Justice and the poor. 271p. Bull. 13. Carnegie Foundation for the Advancement of Teaching. N.Y. '19.

United States. House. Committee on the Judiciary. Charges of illegal practices of the Department of justice: hearings, Jan. 19-Mar. 3, 1921. 788p. 63rd Cong. 3rd Sess.

Whipple, Sherman L. Impairment of popular confidence in the administration of justice. 20p. Address before State Bar Association of Connecticut. F. 2, '14.

Wisconsin Bar Association, 1920:150-69. Popular criticism of the courts. Walter C. Owen.

PERIODICALS

American Bar Association. Journal. 13:726-32. D. '27. Cause of the crime wave. John T. White.

*Reply.* American Bar Association. Journal. 14:103-7 F. '28. Survey Committee, Missouri Association for Criminal Justice.

American Federationist. 31:629-37. Ag. '24. Injunction case without parallel. John P. Frey.

American Federationist. 31:865-8. N. '24. Courts vs. natural rights and freedom. Samuel Gompers.

American Institute of Criminal Law and Criminology. Journal 6:533-45. N. '15. How shall the people of the United States of America reform their legal procedure so as to make it an instrument of justice? Hugh E. Willis.

American Institute of Criminal Law and Criminology. Journal. 19:237-43. Ag. '28. Is the administration of criminal law in Great Britain preferable to that practised in the Commonwealth of Massachusetts? Seymour H. Stone.

American Labor Legislation Review. 14:222-4. S. '24. Judicial obstacles to labor legislation. Florence Kelley.

American Law Review. 45:25-46. Ja. '11. Growing disregard for the law. E. M. Grossman.

American Law Review. 45:481-512. Jl. '11. Judiciary and the law. Everett V. Abbot, Charles A. Boston.

*American Law Review. 48:209-24. Mr. '14. Lawyer's relation to lawlessness. Percy Bell.

American Law Review. 51:239-48. Mr. '17. Do our laws protect criminals? Henry A. Forster.

American Law Review. 56:801-25. N. '22. Duty of disclosure. Sherman L. Whipple.

American Law Review. 57:276-9. Mr. '23. Law and the lawyer. Guy A. Thompson.

American Law Review. 60:321-37. My. '26. Why justice limps in pursuing crime. George B. Rose.

American Law Review. 60:689-718. S. '26. Some observations on the progress of law and lawyers. Reuben R. Arnold.

American Law Review. 61:780-92. S. '27. Business man's opinion of the law. E. B. McNaughton.

American Mercury. 16:438-44. Ap. '29. Trial by jury, or by judge? Sterling E. Edmunds.

Atlantic Monthly. 107:452-64. Ap. '11. Nullifying the law by judicial interpretation. Harrison S. Smalley.

Consensus. 11:2-48. N. '26. Vote of the National council of the National economic league on the causes of lawlessness and disrespect for law.

Harper's Monthly Magazine. 155:750-8. N. '27. Great American game; our sporting theory of criminal justice. Rollin M. Perkins.

Harvard Law Review. 36:361-404. F. '23. Poverty and civil litigation. John M. Maguire.

Journal of Criminal Law. 5:479-84. N. '14. Practice of law: is it a profession or a business? Robert Ferrari.

Journal of Criminal Law. 7:330-40. S. '16. Causes of delay in criminal cases. Albert C. Barnes.

Law Notes. 32:141. N. '28. Influence of the profession.

Literary Digest. 97:12. Je. 2, '28. Chicago judges at the bar of justice.

Outlook and Independent. 150:1283. D. 5, '28. Blow at freedom; Minnesota law which permits a judge to decide what is defamatory or malicious.

Putnam's Monthly. 2:293-6. Je. '07. Legal defeaters of the law. Frederick T. Hill.

Saturday Evening Post. 195:11. O. 28, '22. Campaign against crime: the judges' part in it. R. M. Wanamaker.

University of Kentucky. University Extension Series. Bulletin. 8:1-310. S. 1, '29. Debate handbook on the law's delay and the trial jury. William R. Sutherland, comp.

## The Police

### Books and Pamphlets

Fosdick, Raymond B. American police systems. 408p. Century Co. N.Y. '20.

Robinson, Louis N. Relation of the police and the courts to the crime problem. 37p. National Crime Commission. N.Y. F. 28, '28.

*Excerpts.* American City. 38:84-7. Ap. '28.

### Periodicals

American Institute of Criminal Law and Criminology. Journal. 16:219-71. Ag. '25. Present police and legal methods for the determination of the innocence or guilt of the suspect. J. A. Larson.

*American Law Review. 58:781-94. S. '24. Personal liberty. Thomas B. Buckner.

Annals of the American Academy. 146:1-268. N. '29. Police and the crime problem.

*Harper's Monthly Magazine. 155:605-14. O. '27. Official lawlessness; third degree and the crime wave. Oswald Villard.

Independent. 117:117. Jl. 31, '26. Police disunity aids crime.

Nation. 128:338-9. Mr. '20, '29. Murder by coal and iron police. William L. Munn and Frederick E. Woltman.

New Republic. 52:328-9. N. 16, '27. Law and order.

North American Review. 227:219-28. F. '29. Our inefficient police. Howard McLellan.

World Tomorrow. 12:56. F. '29. Official ruthlessness.

## Responsibility of the Newspapers

### Books, Pamphlets and Documents

Cole, Virginia L. Newspaper and crime. 84p. University of Missouri Bulletin, v. 8, no. 4. Journalism ser. no. 44. Columbia. Ja. 21, '27.

Dennis, Charles H. Newspapers and crime prevention. 12p. Reprint No. 28. Chicago Daily News. Chic. '27.

Sherriff, Andrew R. Newspapers and the courts. 17p. Hawkins and Loomis Co. Chic. '24.

Taft, Henry W. Press and the courts. *In* his Law reform. p. 140-70. Macmillan. N.Y. '26.

Thompson, Guy A. What the lawyer wishes from the newspaper. 14p. Author. St. Louis, Mo. My. 14, '24.

### Periodicals

American Bar Association. Journal. 9:9-13. Ja. '23. Press and the administration of justice. Thomas W. Shelton.

American Bar Association. Journal. 13:390-7. Jl. '27. Relation of daily press to crime and the administration of justice: report of the sub-commission of the New York state crime commission.

American Institute of Criminal Law and Criminology. Journal. 15:155-8. My. '24. Influence of journalism on crime. Theodore Spector.

American Institute of Criminal Law and Criminology. Journal 17:40-103. My. '26. Effects of news of crime and scandal upon public opinion. Robert D. Highfill.

Bibliography. p. 101-3.

Christian Century. 40:1424-6. N. 8, '23. Chicago Tribune as a breeder of anarchy.

Methodist Review. 109:66-74. Ja. '26. Public morals and the newspaper. Paul Hutchinson.

National Education Association. Journal. 13:202. Je. '24. Enforcing the law. Florence E. Allen.

## Civil Liberties

### Books, Pamphlets and Documents

Chafee, Zechariah, Jr. Liberty and law. *In* Kallen, Horace M. ed. Freedom in the modern world. p. 82-114. Coward-McCann. N.Y. '28.

Hays, Arthur G. Let freedom ring. 341p. Boni and Liveright. N.Y. '28.

Phelps, Edith M. ed. Governmental restriction of individual liberty: debate. *In* University debaters' annual, 1925-1926. p. 143-93. H. W. Wilson Co. N.Y. '26.

Taft, Henry W. Freedom of speech and the espionage act. *In* his Law reform. p. 200-28. Macmillan. N.Y. '26.

Thomas, Norman. Is conscience a crime? 303p. Vanguard Press. N.Y. '27.

### Periodicals

American Political Science Review. 18:712-36. N. '24. Freedom of speech during and since the Civil war. Richard H. Eliel.

Forum. 81:290-8. My. '29. Should radicalism be suppressed? a debate. Arthur G. Hays; Archibald E. Stevenson.

*Discussion.* 81:sup.30-3. Je. '29.

Harper's Monthly Magazine. 151:440-7. S. '25. New fight for old liberties. Oswald G. Villard.

Harper's Monthly Magazine. 159:1-10. Je. '29. Dangers of obedience. Harold J. Laski.

Nation. 128:560. My. 8, '29. Same old-dragon. Freda Kirchwey.

Nation. 129:30. Jl. 10, '29. Freedom of belief—for citizens only.

New Republic. 55:318-20. Ag. 15, '28. Endless battle.

New Republic. 57:345-6. F. 13, '29. Land of the free: 1928. R. Lowood.

New Republic. 59:246-7. Jl. 24, '29. Fight for civil liberties.

World Tomorrow. 12:152-4. Ap. '29. Pacifism and the state. Bruce Curry.

### Extra-Legal Methods

#### Books

American Bar Association. Report, 1921:266-84. Illegal enforcement of criminal law. Luther Z. Rosser.

Nearing, Scott. Lynch law. *In* his Black America. p. 197-212. Vanguard Press. N.Y. '29.

Southern Sociological Congress, 1916-1918. Democracy in earnest. p. 185-200. *Mob violence an enemy of both races. William O. Scroggs; Causes, consequences and cure of mob violence. Charles M. Bishop. Wash., D.C. '18.

#### Periodicals

American Law Review. 60:1-18. Ja. '26. Law enforcement. E. H. Randolph.

American Law Review. 61:227-45. Mr. '27. Vanishing bill of rights. Forrest R. Black.

American Mercury. 16:77-84. Ja. '29. Investigate lynching. Walter White.

American Review. 2:241-51. My. '24. Ku Klux Klan and the democratic tradition. John M. Mecklin.

Blackwood's Magazine. 220:204-9. Ag. '26. Without benefit of law. Louis M. Jiggitts.

Collier's. 83:8-9. Ap. 20, '29. Vigilantes take charge. William G. Shepherd.

Forum. 36:280-8. O. '04. Private societies and the enforcement of the criminal law. Champe S. Andrews.

Independent. 95:177. Ag. 10, '18. Open letter on mob violence; text. Woodrow Wilson.

Law Notes. 28:201. Ja. '25. Enforcement of law through private agencies.

New Republic. 16:5-7. Ag. 3, '18. Mob violence and war psychology.

## Reforms and Remedies

### Books, Pamphlets and Documents

*American Bar Association. Report, 1916:395-407. Lawyer and the public. William E. Borah.

American Bar Association. Report, 1926:693-719. Is our civilization competent to deal with its problem of crime. Charles A. Boston.

American Bar Association. Reports of the Special committee on law enforcement presented at the annual meetings, 1922, 1923. 2d ed. 94p. Chic. n.d.

*Also* in American Bar Association. Report, 1922:424-32; 1923:415-36. The latter report also appears in its Journal. 9:660-8. O. '23.

American Year Book, 1926:622-5. Movements to check crime. Herbert S. Hadley.

Beman, Lamar T. comp. Outlawing the pistol. 77p. Reference Shelf, v. 3, no. 10, H. W. Wilson Co. '26.

Illinois State Bar Association. Proceedings, 1925:310-17. Lawyer's relation to law enforcement. Floyd E. Thompson.

National Conference of Social Work. Proceedings, 1928: 136-42. Contribution which the juvenile court has to make to the success of law enforcement. T. Munford Boyd.

National Probation Association. Annual report and proceedings, 1927:185-209. Unused social resources for the prevention of crime. William L. Butcher.

New York State Bar Association. Proceedings, 1927: 181-8. Criminal law and its enforcement. Joab H. Banton.

Storey, Moorfield. Reform of legal procedure. 263p. Yale Univ. Press. New Haven. '11.

Swaney, William B. Law enforcement. 23p. mim. Institute of Public Affairs. Charlottesville. Va. Ag. 15, '29

Taft, Henry W. Law reform. 265p. Macmillan. N.Y. '26.

White, Edward J. Reform of judicial procedure. *In* his Legal traditions and other papers. p.50-70. Thomas Law Book Co. St. Louis. '27.

PERIODICALS

Academy of Political Science. Proceedings. 10:763-7. Ja. '24. Jurisprudence and law reform. Everett P. Wheeler.

American Bar Association. Journal. 8:278-80. My. '22. Remedy for crime situation sought.

American Bar Association. Journal. 9:640-1, 784-5. O.-D. '23. Law enforcement.

American Institute of Criminal Law and Criminology. Journal. 15:343-6. N. '24. Control by morale.

American Institute of Criminal Law and Criminology. 18:378-83. N. '27. Activities of bar associations and legislatures in connection with criminal law reform. Justin Miller.

American Law Review. 56:77-84. Ja. '22. Will we learn the lesson? J. C. McWhorter.

American Political Science Review. 23:930-55. N. '29. Notes on judicial organization and procedure. Walter F. Dodd.

American Review. 4:139-56. Mr. '26. Ministry of justice and the problem of crime. Sheldon Glueck.

Atlantic Monthly. 116:12-20. Jl. '15. Law, police and social problems. Newton D. Baker.

Bookman. 64:44-52. S. '26. Reflections on the crime wave. Harry E. Barnes.

Case and Comment. 24:730-9. F. '18. Education in Americanism. Martin J. Wade.

Chamber of Commerce of the State of New York. Monthly Bulletin. 21:82-9. Je. '29. New way to attack crime. Alpheus Geer.

Commercial and Financial Chronicle. 130:402-4. Ja. 18, '30. Reports of President Hoover's commission on national law enforcement: criminal law enforcement held inadequate.

Current History. 23:470-5. Ja. '26. Curbing crime in the United States. Theodore E. Burton.

Current History. 30:683. Jl. '29. Hoover commission begins law enforcement inquiry. Albert B. Hart.

Good Housekeeping. 81:35+. N. '25. Know your courts. Ruth Boyle.

Journal of Delinquency. 11:277-8. D. '27. Some suggestions for state action in securing standardized criminal statistics. Emil Frankel.

Law Quarterly Review. 43:449-69. O. '27. American law institute and the projected statement of the common law in America. George W. Wickersham.

*Massachusetts Law Quarterly. 10:60-5. Ag. '25. Crime and the criminal law. Roscoe Pound.

Nation. 129:158. Ag. 14, '29. War on crime.

New Republic. 58:158-9. Mr. 27, '29. Law as a social instrument.

New Republic. 58:187. Ap. 3, '29. Wages of enforcement.

Review of Reviews. 68:191-2. Ag. '23. Our chaos of laws, a movement for order and simplicity: the American law institute.

Saturday Evening Post. 195:9. F. 24, '23. Crime wave and how to deal with it. Basil Thomson.

Saturday Evening Post. 200:32. My. 12, '28. Greatest issue of all.

Saturday Evening Post. 201:30. Je. 1, '29. Sob brothers; sentimental attitude toward the criminal.

*Social Forces. 8:198-208. D. '29. Factors in law enforcement. Ray E. Baber.

World Review. 2:89-90. Mr. 22, '26. Making public opinion count. Edward A. Ross.

*World Unity. 4:311-12. Ag. '29. Sovereignty of law.

*World's Work. 51:601-9. Ap. '26. Rising tide of crime. Lawrence Veiler.

## Law Observance and Enforcement

### Books, Pamphlets and Documents

Alabama State Bar Association. Report, 1927:94-6. Law enforcement and law observance. D. R. Coley.

American Bar Association. Report, 1921:260-301. *Unenforceable law. Charles S. Whitman; Illegal enforcement of criminal law. Luther Z. Rosser; Adjustment of penalties. Marcus Kavanaugh.

Fisher, Herbert. Problems in political obedience. *In* his Common Weal. p. 115-40. Clarendon Press. Oxford. '24.

Harding, Warren G. Address of the President of the United States on law enforcement. 8p. Govt. Printing Off. Wash., D.C. '23.

Illinois State Bar Association. Proceedings, 1914:319-49. Enforcement of law. Robert McMurdy.

Indiana. Indiana conference on law observance and enforcement called by Governor Harry G. Leslie. 144p. Indianapolis. O. 11-12, '29.

Indiana State Bar Association. Proceedings, 1919:86-92. Individual responsibility and respect for law. Ernest R. Keith.

*Indiana State Bar Association. Report, 1915:64-82. Respect for the law. Thomas E. Davidson.

Judson, Harry P. Our federal republic. Ch. 5. Macmillan. N.Y. '25.

Lincoln, Abraham. Perpetuation of our political institutions: address before the Young men's lyceum, January 27, 1873. *In* his Complete works. v. 1, p. 9-15. John G. Nicolay and John Hay, eds. Century Co. N.Y. '20.

*Maryland State Bar Association. Report, 1904:19-39. Lawlessness. Moorfield Storey.

National Conference of Social Work. Proceedings, 1928: 127-36. Law observance versus law enforcement. Karl N. Llewellyn.

Oregon Bar Association. Proceedings, 1913:83-95. Law enforcement. John H. McNary.

*Pennsylvania Bar Association. Report, 1927:308-22. Importance of law observance. John G. Sargent.

*Roosevelt, Theodore. His life, meaning and messages. 3v. Current Literature Pub. Co. N.Y. '19.

Liberty through law. v. 1, p. 138-41; Supremacy of law. v. 1, p. 141-4; Enforcement of law the first requisite of civilization. v. 1, p. 279-83; Enforcement of law against corporations. v. 2, p. 580-5.

Sheldon, Walter L. Obedience to law as due to one's country. *In* his Citizenship and the duties of a citizen. p. 192-206. W. M. Welch Co. Chic. '04.

Southern Sociological Congress, 1916-1918. Democracy in earnest. p. 181-5. Vitalizing the law. W. B. Turner.

State Bar Association of Wisconsin. Report, 1925:131-54. Lawlessness and law observance. William D. Thompson.

State Bar Association of Wisconsin. Report, 1926:143-9. Enforcement of the criminal law. Philip F. LaFollette.

Storey, Moorfield. Lawlessness. *In* his Problems of today. p. 54-102. Houghton Mifflin Co. Bost. '20.

*United States President. Address of President Hoover at the annual luncheon of the Associated press, April 22, 1929. 5p. Supt. of Docs. Wash., D.C. '29.

*Same.* Commercial and Financial Chronicle. 128: 27421-2. Ap. 27, '29. *Same*: New York Times. p. 2. Ap. 23, '29.

Washington State Bar Association. Proceedings. 1922: 118-24. Law its enforcement: cause, effects, and cures. J. W. De B. Farris.

Whitlock, Brand. On the enforcement of law in cities. 95p. Bobbs-Merrill Co. Indianapolis. '13.

Willoughby, William F. Enforcement. *In* his Principles of Judicial Administration. p. 91-208. Brookings Institution. Wash., D.C. '29.

PERIODICALS

American Bar Association. Journal. 9:805-6. D. '23. Law enforcement in a great city [Chicago]. William E. Dever.

American Law Review. 60:782-90. S. '26. Law enforcement. John G. Sargent.

Annals of the American Academy. 34:85-9. Jl. '09. Importance of the enforcement of law. Champe S. Andrews.

Atlantic Monthly. 110:295-301. S. '12. Automatic citizen. Thomas R. Marshall.

*Atlantic Monthly. 134:1-5. Jl. '24. Law and manners. John F. Moulton.

*Same.* Congressional Record. 70:4502-4. F. 27, '29.

Catholic World. 128:224-5. N. '28. Civil law binds the conscience. John A. Ryan.

Century. 114:641-8. O. '27. Civic righteousness; lawlessness the insidious disease of republics. William E. Borah.

*Christian Century. 40:1549-51. N. 29, '23. Romance of law. Lynn H. Hough.

Collier's. 83:8-9. Mr. 2, '29. Meet the colonel. William G. Shepherd.

Commonweal. 9:736-8. My. 1, '29. Dilemmas of the law. Elmer Murphy.

Congressional Record. 69:2920-1. F. 13, '28. Law observance. Ernest H. Van Fossan.

Forum. 43:11-20. Ja. '10. Enforcement of law. Theodore Roosevelt.

*Forum. 82:1-7. Jl. '29. Hoover and law observance. James T. Adams.

*Harper's Monthly Magazine. 151:641-8. N. '25. Law making and law enforcement. Arthur T. Hadley.

Law Notes. 26:228-32. Mr. '23. Waning respect for law. Minor Bronaugh.

Literary Digest. 94:34. Ag. 6, '27. Warning for scofflaws.

Massachusetts Law Quarterly. 14:100-26. My. '29. Law observance, law enforcement and the limits of effective legal action.

Minnesota Municipalities. 15:7-9, 10-13. Ja. '30. To law enforcing agencies and officers. Theodore Christianson; Law enforcement conference meets.

Nation. 90:582-3. Je. 9, '10. Enforcement of the laws. Herbert L. Baker.

National Municipal Review. 18:663-9. N. '29. Thwarting official crime and corruption in Chicago. Albert R. Brunker.

New England Waterworks Association Journal. 43: 402-9. D. '29. Enforcement with other beverages. J. Frederick Jackson.

*New Republic. 88:297-300. My. 1, '29. Ethics of nullification. Robert C. Binkley.

*Same.* Massachusetts Law Quarterly. 14: 9-15. My. '29.
*Discussion.* New Republic. 59: 25-6. My. '22. Orville S. Poland; New Republic. 59: 129. Je. 19, '29. Nathaniel H. Kugelmass.

North American Review. 227:744-51. Je. '29. Wisconsin gets her men. Ruel McDaniel.

Outlook. 139:95-6. Ja. 21, '25. Jungle or civilization?

Saturday Evening Post. 201:32. My. 25, '29. Dominant issue.

Scientific Monthly. 24:129-35. F. '27. Law enforcement through self-restraint. Hastings H. Hart.

Survey. 62:304-7. Je. '29. Vollmer and his college crops. Anne Roller.

United States Law Review. 63:342-3. Jl. '29. Presidential law enforcement.

*World Review. 2:248-9. Je. 7, '26. Building respect for law. Edward A. Ross.

World Tomorrow. 8:49-51. F. '25. Ethics of compulsion. Paul Jones.

World Tomorrow. 10:306-7. Jl. '27. Civil disobedience. Patrick M. Malin.

World's Work. 18:11828-33. Jl. '09. Story of law enforcement: Los Angeles. Thomas L. Woolwine.

Yale Review. n.s. 19:1-13. S. '29. Popular dogma of law enforcement. Walter Lippmann.

## Prohibition

### Books, Pamphlets and Documents

*American Bar Association. Report, 1928:174-6. Address. Silas Strawn.

American Year Book, 1927:19-25. Prohibition controversy. Irving Fisher.

Andrews, Lincoln C. Analysis of operation of federal and state laws affecting prohibition. 13p. Government Printing Off. Wash., D.C. '26.

Beman, Lamar T. comp. Prohibition: modification of the Volstead law: supplement to handbook. Reference Shelf v. 5, no. 1. 154p. H. W. Wilson Co. N.Y. '27.

Beman, Lamar T. comp. Selected articles on prohibition: modification of the Volstead law. 380p. H. W. Wilson Co. N.Y. '24.

*Borah, William E. Obedience to law. 16p. Govt. Printing Office. Wash., D.C. F. 18, '29.

*Same.* Congressional Record. 71:(current)3783-7. F. 18, '29.

Borah, William E. and Butler, Nicholas M. Roosevelt Club Borah-Butler debate. 55p. Roosevelt Club. Bost. '27.

Buffington, Joseph. Plea for cooperation between citizens and officials to promote the success of law enforcement. 3rd ed. Law Enforcement League of Philadelphia, 915 Land Title Bldg. Phila. '26.

Commission on Youth and Law observance. What about prohibition and the law of my country? [11]p. 100 Fifth Ave. N.Y.

Darrow, Clarence. Does contempt for prohibition breed contempt for other laws? *In* his Prohibition mania. p. 177-93. Boni and Liveright. N.Y. '27.

Durant, W. C. ed. Law observance: shall the people of the United States uphold the Constitution.. 573p. Durant Award Office. 250 W. 57th St., N.Y. '29.

Ellis, Wade H. Put the liquor problem up to the people. 21p. mim. Institute of Public Affairs, University of Virginia. Ag. 15, '29.

*Same.* Congressional Record. 71:(current)3774-7. S. 14, '29.

Farnam, Henry W. Law of the land and our moral frontier. 23p. New Haven Committee on Law Enforcement. New Haven. '25.

Ford, John. What shall we do about it? 12p. New York State Womens' Committee for Law Enforcement. 129 E. 52 St. N.Y.

Governors' Conference. Proceedings, 1929:22-32, 37-45, 116-17, 134-46. Law enforcement. Cary A. Hardee. Sec. Live Oak, Fla. '29.

Hearst Temperance Contest Committee. Temperance or prohibition. 397p. 220 South St. N.Y. '29.

High, Stanley. Prohibition. 23p. mim. Institute of Public Affairs. University of Virginia. Charlottesville, Va. Ag. 14, '29.

Illinois State Bar Association. Proceedings, 1927:165-71. Enforcement of the law.

Kelsey, R. W. Prohibition. 32p. Handbook of Citizenship, No. 1. McKinley Pub. Co. Phila. '29.

Lashly, Arthur V. Professional criminal and organized crime; with a symposium on the effects of prohibition. 37p. American Bar Association. Chic. '28.

McAdoo, William G. Challenge: liquor and lawlessness versus constitutional government. 304p. Century Co. N.Y. '28.

McAdoo, William G. Prohibition, nullification and lawlessness. 35p. Govt. Printing Office. Wash., D.C. '27.
*Same.* Congressional Record. 68:(current)2609-15. Ja. 29, '27.

McBain, Howard L. Prohibition: legal and illegal. 171p. Macmillan. N.Y. '28.

*Marshall, Carrington T. Liberty under law in America. 15p. Citizens Committee of One Thousand, 100 Fifth Ave. N.Y. '27.

New York State Bar Association. Proceedings, 1928: 228-46. Has the Volstead law nullified the eighteenth amendment? Martin Conboy; with discussion.

Ritchie, Albert C. Enforcement of the eighteenth amendment and the Volstead act from the point of view of the individual states. 26p. mim. Institute of Public Affairs, Charlottesville, Va. Ag. 14, '29.

Ryan, John A. Moral aspects of national prohibition. *In* his Declining liberty and other papers. p. 43-63. Macmillan. N.Y. '27.

Stevenson, Archibald E. States' rights and national prohibition. 15p. Clark Boardman Co. N.Y. '27.

United States. House. Committee on the Judiciary. To establish an independent prohibition bureau: hearing on H.R. 12035. 33p. 67th Cong. 4th Sess. F. 19, '23.

United States. Senate. Committee on the Judiciary. Brewing and liquor interests and German and Bolshevik propaganda: report and hearings. 3 vol. Senate doc. no. 62. 66th Cong. 1st Sess. Wash., D.C. '19.

United States. Senate. Committee on the Judiciary. Bureau of prohibition (Cramton bill): hearings before a subcommittee on H.R. 6645, Dec. 18, 19, 1924, Jan. 7-9, 1925. 265p. 2pts. 68th Cong. 2d Sess. '24, '25.

United States. Senate. Committee on the Judiciary. National prohibition law: hearings before the subcommittee on S. 33 etc. April 5-24, 1926. 2v. 1660p. 69th Cong. 1st Sess. '26.

Warner, Harry S. Prohibition: an adventure in freedom. 265p. World League Against Alcoholism. Westerville, O. '28.

Washington State Bar Association. Proceedings, 1922: 118-24. Law—its non-enforcement: cause, effects and cures. J. W. De B. Farris.

Willebrandt, Mabel W. Inside of prohibition. 347p. Bobbs-Merrill Co. Indianapolis. '29.

Wright, William B. Jr. Four years of law enforcement in Pennsylvania; report to Governor Pinchot. 22p. Harrisburg. '26.

PERIODICALS

*American Bar Association. Journal. 8:162-5. Mr. '22. Need to enforce respect for law. Kimbrough Stone.

American Bar Association. Journal. 9:98-102. F. '23. Law and lawlessness. Nicholas M. Butler.

American Bar Association. Journal. 12:554-8. Ag. '26. Problem of law enforcement in the large cities of the United States. William E. Dever.

*American Bar Association. Journal. 14:550-2. O. '28. Prohibition and nullification. Edward C. Lukens.

American Bar Association. Journal. 15:276-8. My. '29. Jones-Stalker law: its legal consequences. Goodwin Cooke.

American Law Review. 59:801-25. N. '25. Rights of the people of the states. George R. Hull.

American Mercury. 19:181-8. F. '30. Hurdles for the Hoover commission. H. L. McBain.

Annals of the American Academy. 129:77-94. Ja. '27. Prohibition enforcement as a phase of federal versus state jurisdiction in American life. Lincoln C. Andrews; Social aspects of federal and state control. Samuel M. Lindsay.

Atlantic Monthly. 143:145-51. F. '29. Reconstruction and prohibition. A. Lawrence Lowell.

Catholic World. 129:102-7. Ap. '29. Editorial comment on President Hoover's inaugural address. J. M. Gillis.

Century. 116:352-7. Jl. '28. On prohibitions; the conflict between American law and customs. Philip Dexter.

Century. 116:585-92. S. '28. Why conspiracy; conviction possible without an illegal act committed. Julius Hallheimer and John T. De Graff.

Century. 118:129-40. Je '29. Indictment of prohibition. Joseph S. Auerbach.

Collier's. 77:25. Ja. 9, '26. Law without consent is dead. Chester T. Crowell.

Collier's. 82:8-9. D. 1, '28. Price of liquor; Philadelphia's amazing defiance of the prohibition law. William G. Shepherd.

Collier's. 83:8-9, 50. F. 2, '29. Dry eyes on Hoover; interview with F. Scott McBride. Walter Davenport; Be your own dry agent.

Collier's. 84:8-9. Jl. 13, '29. Call out the marines. Clarence T. Wilson.

Collier's 84:8-9. Ag. 3, '29. What's wrong with prohibition? Clarence T. Wilson.

Commercial and Financial Chronicle. 129:419-20. Jl. 20, '29. Governor's conference considers G. W. Wickersham's proposal for law enforcement.

Commonweal. 9:616-18. Ap. 3, '29. Who shall obey the law? John A. Ryan.

*Reply.* Commonweal. 10:102-3. My. 29, '29. A. Wagner.

Commonweal. 10:1-2. My. 8, '29. Freedom under the law.

Commonweal. 10:396, 405. Ag. 21, '29. Why is Catholic leadership against the eighteenth amendment, with editorial reply. E. C. Short.

Congressional Digest. 5:187-205. Je. '26. Congress and prohibition enforcement.

Congressional Record. 68:1302-4. Ja. 8, '27. Corruption in political campaigns and law enforcement. William E. Borah.

Congression Record. 68:(current)2609-15. Ja. 29, '27. Prohibition, nullification and lawlessness. William G. McAdoo.

Congressional Record. 69:2471-5. F. 4, '28. Prohibition enforcement—the evil and the remedy. William G. McAdoo.

Congressional Record. 69:5229-31. Mr. 22, '28. Constitution versus the liquor traffic. John A. Lapp.

Congressional Record. 70:(current)4969-79. Mr. 1, '29. Amendment of national prohibition act. James A. Reed.

Congressional Record. 71:(current)570-2. Ap. 25, '29. Law enforcement. Wesley L. Jones.

Congressional Record. 71:701-4. My. 1, '29. Practical cooperation in prohibition. James P. McGovern.

Congressional Record. 71:1005-6. My. 9, '29. We need laws we can respect. William R. Hearst.

Congressional Record. 69:10267-71. My 28, '29. Why prohibition repeal is unthinkable. James Cannon, Jr.

Congressional Record. 71:3096-3101. Je. 19, '29. Prohibition enforcement.

*Congressional Record. 72:(current)1561-9. Ja. 13, '30. Prohibition report of the law enforcement commission.

*Same.* Current History. 31:985-92. F. '30.

Constitutional Review. 11:181-98. O. '28. Experiment of prohibition. Felix Rackemann; Seizure and search under national prohibition. Howard B. Wilson.

Current History. 25:1-5. O. '26. Are the wets hypocrites in their plea for states rights? Wayne B. Wheeler.

Current History. 28:10-17, 34-41. Ap. '28. Enforcement an increasing success. Albert Levitt; Eighteenth amendment an invasion of state rights. Albert C. Ritchie; Increasing observance of prohibition. James J. Britt.

Current History. 28:910-13. S. '28. Sweeping changes in dry law enforcement. Herbert E. Morgan.

Current History. 29:7-17. O. '28. Governor Smith's proposals to change prohibition laws; a debate. George G. Battle; Orville S. Poland; Full text of Governor Smith's proposals.

Current History. 29:529-34. Ja. '29. Prohibition victorious. Ernest H. Cherrington.

Current History. 30:781-96. Ag. '29. Enforcement of prohibition. William C. Bruce; Stanley High.

Editorial Research Reports. p. 689-701. S. 2, '29. Reorganization of prohibition enforcement.

Forum. 81:257-62, 328-34. My.-Je. '29. Can prohibition succeed? a Socratic dialogue.

*Forum. 82:98-103. Ag. '29. Repeal the Jones act! Frederic R. Coudert, Jr.

Forum. 82:135-9. S. '29. Enforce prohibition. Francis S. McBride.

*Forum. 82:218-23. O. '29. Fallacies of prohibition. Fabian Franklin.

Good Housekeeping. 82:28-9. Ap. '26. Propaganda against prohibition. Allan L. Benson.

*Also* separate. 19p. Woman's National Committee for Law Enforcement. I Arsenal Sq. Cambridge, Mass.

Harper's Monthly Magazine. 154:51-6. D. '26. Our predicament under the eighteenth amendment. Walter Lippmann.

Harper's Monthly Magazine. 159:257-60. Jl. '29. More thoughts on the leading topic. Edward S. Martin.

Journal of Applied Sociology. 8:156-9. Ja. '24. Is prohibition a failure? Frank W. Blackmar.

Ladies' Home Journal. 45:15. O. '29. Lawlessness. George W. Pepper.

Manufacturers Record. 79:113-14. Ja. 6, '21. Cowardly surrender to the criminals' efforts to prove that the nation cannot enforce its laws.

Massachusetts Law Quarterly. 14:118-26. My. '29. Use of the federal padlock law in state courts. Alexander Lincoln.

Nation. 128:551. My. 8, '29. It seems to Heywood Broun; Mr. Hoover and law.

Nation. 128:672-3. Je. 5, '29. Emperor or president. Clarence Darrow.

Nation. 129:60-1. Jl. 17, '29. Law, and law enforcement. Victor S. Yarros

Nation. 129:107. Jl. 31, '29. Wickersham letter.

Nation. 129:291. S. 18, '29. Nation's laws; state enforcement.

New Republic. 59:257-9. Jl. 24, '29. That squelched prohibition pamphlet. Duff Gilfond.

New Republic. 60:240-2. O. 16, '29. States and prohibition. Rex M. Naylor.

*New York Times. p. 18. Mr. 13, '30. Prohibition creed.

North American Review. 211:348-54, 778-82. Mr. Je. '20. Concurrent power. Monroe Buckley; reply. Joseph E. Pottle.

North American Review. 222:57-60, 73-8. S. '25. Prohibition and law enforcement. Gifford Pinchot; Situation we are in. Horace D. Taft.

North American Review. 225:545-7. My. '28. Rum runners and blockade runners; Bermudas and the Bahamas. Pierre Crabitès.

North American Review. 227:641-7. Je. '29. Farce of enforcement. Courtlandt Nicoll.

North American Review. 228:65-70. Jl. '29. Congress shall have power. Henry A. Johnston.

North American Review. 228:291-9. S. '29. Shall we scrap the constitution? David L. Fultz.
Review of Reviews. 80:55-7. O. '29. Prohibition and the future. Mabel W. Willebrandt.
Round Table. 19:765-82. S. '29. Progress of prohibition.
Saturday Evening Post. 201:30. N. 17, '28. Oblique government.
Saturday Evening Post. 201:31. F. 2, '29. Some facts about dry enforcement. Remsen Crawford.
Survey. 63:571-2. F. 15, '30. Experts on law enforcement. Karl N. Llewellyn.
United States Law Review. 63:561-5. N. '29. Duty of the states in respect of prohibition.
Virginia Quarterly Review. 2:161-74. Ap. '26. These things doth the Lord hate. J. G. De R. Hamilton.
West Publishing Co's Docket. 3:2572-3. Ja '23. Judiciary and prohibition enforcement.
World's Work. 58:35. Je. '29. Herrings across the trail. Booth Tarkington.
World's Work. 58:68-71. Ag. '29. Intricacies of the dry law. Dudley C. Lunt.
World's Work. 58:38-9. D. '29. Prohibition enforcement.
World's Work. 59:41. F. '30. Ten years of attempted prohibition; editorial.

# INTRODUCTION

The American people are deeply concerned over the alarming disobedience of law, the abuses in law enforcement and the growth of organized crime, which has spread in every field of evil-doing and in every part of our country. A nation does not fail from its growth of wealth or power. But no nation can for long survive the failure of its citizens to respect and obey the laws which they themselves make. Nor can it survive a decadence of the moral and spiritual concepts that are the basis of respect for law nor from neglect to organize itself to defeat crime and the corruption that flows from it. Nor is this a problem confined to the enforcement and obedience of one law or the laws of the federal or state governments separately. The problem is partly the attitude toward all law.

Thus, at the initial meeting of the National Commission for Law Observance and Enforcement at the White House on May 28, 1929, did President Hoover characterize the situation before the country, concerning which the Commission was called to "secure an accurate determination of fact and cause, following them with constructive, courageous conclusions which will bring public understanding and command public support of its conclusions."

In two previous addresses, his inaugural speech and that to the Associated Press, the President had made notable comment on the existing disregard of law and the necessity for the reestablishment of greater effectiveness in enforcement. The issue thus brought prominently to the front was not new. Other Presidents had spoken clearly upon lawlessness in our national life, Lincoln, Roosevelt, Coolidge, to mention a few. In 1909 President Taft had said, in his oft quoted remarks,

It is not too much to say that the administration of criminal law in this country is a disgrace to our civilization, and that the prevalence of crime and fraud which is here, greatly in excess of that in European countries, is due largely to the failure of the law and its administrations to bring criminals to justice.

In 1921 the American Bar Association appointed a special committee on law enforcement to investigate and suggest remedies. Its report was presented in August, 1922. Among other things it found "Since 1890 there has been and continues a widening, deepening tide of lawlessness in this country sometimes momentarily receding, but swelling again into greater depths of intensity," also, "There has been since 1910 a steady and terrible increase not only in homicides, but also in burglaries and robberies." Historians have traced a non-law-conforming spirit of individualism back to the foundations of our Republic, while others have carried their observations beyond our own national life and era. Thus Professor Arthur Patch McKinley of the University of California, after an exhaustive study of the memoirs of Cicero, has stated: "Gangsters, racketeers, senate filibusters, high financeering and other so-called phenomena of modern civilization were just as prevalent in ancient history." Still others have suggested that lawlessness is rooted in the beginnings of law itself. It may, therefore, be viewed in the light of its relative importance as measured by the law-abiding tendencies of the age. The deepest thinkers have pointed out the dangers to the national life when lawlessness is permitted to increase and hold sway.

In addition to the interest arising through the appointment of the Presidential commission, lawlessness and the policy of law enforcement have been brought very much into the foreground by the intensely controversial interest in prohibition. At this time there are under way Congressional hearings in which the subject is being thoroughly threshed. Anti-prohibitionists and the liquor interests are apparently determined to break down the law. They are receiving aid from all who can be made to feel that their personal liberty is involved, who are irritated by officious meddling, alienated by unfortunate incidents of enforcement or by some undue severity of punishment as, for example, under the Jones

"five and ten" law, by those who can be persuaded that prohibition enforcement has "failed" and is therefore hopeless, or for other reasons of specious adequacy or otherwise. Evidence goes to show that the opposition to prohibition is backed by immense forces of publicity and propaganda. Thus, an association opposed to the eighteenth amendment announced in 1920 that it was backed by a billion dollar fund to see to it that the amendment should not become operative. The New York Times of December 11, 1929, under the caption "Aims At 30,000,000 To Back Wet Drive," refers to the incorporation of an association headed by Edward E. Spafford, former national commander of the American Legion, in "an effort to enroll every educational, civic, patriotic, fraternal, professional and social organization in the country in one unified drive against the eighteenth amendment." The trend of the press discussion, editorial and otherwise, needs no comment. The steady portrayal of scenes on the screen condoning prohibition violation has been challenged by *The Churchman.* In resigning from the Committee on the Use of the Motion Picture in Religion, Mr. Sidney A. Weston, wrote,

> Here we are, a nation which has adopted the eighteenth amendment, here is President Hoover trying to enforce the prohibition law, and meanwhile this play and others of similar character all through the motion picture productions represent drinking as a matter of course; something to be desired; something that all real people do. This influence is vicious.

To offset this there has been effort by the organizations upholding this experiment "noble in motive," and representing, perhaps, vast forces of individual consciences and convictions.

Prohibition has now been tried out for a decade. One of its leading problems, aside from that of modification, is the states-federal issue. Failing to affect the federal status, efforts have been made to break down state enforcement, with the result that five states, Maryland, New York, Nevada, Montana, and Wisconsin are

now without enforcement acts. Wisconsin is reported as trying to "put the state into the liquor business on the theory that the eighteenth amendment cannot affect the sovereign states as legal entities, but only the individual citizen." In contrast to this have been messages of many governors urging better prohibition laws, stricter enforcement, full cooperation, severer penalties for violation, or other evidence of support for these much debated laws. In midsummer of 1929 George W. Wickersham, chairman of the Hoover Commission, in a letter read at the annual conference of state governors then in session, suggested the states assume a larger share of responsibility for enforcement and that prohibition laws "might be modified so as to become reasonably enforceable."

One of the most discussed of the enforcement provisions of prohibition has been the Jones-Stalker act, usually called the Jones or the "five and ten" law, passed in the last days of the Coolidge administration. This act increased penalties for violating the liquor laws, providing a fine not to exceed $10,000 or imprisonment not to exceed five years. It was "the intent of Congress that the Court, in passing sentence, should discriminate between casual or slight violations and habitual sales of intoxicating liquors, or attempts to commercialize violations of the law," an intent that has not been perfectly carried out in practice. Following its initial operations a group of lawyers in the east organized to defend without charge any person tried under it and lacking means for defense. This direct challenge to law by persons prominent in the legal profession was followed by an announcement that a lawyer's organization practicing in the federal court would back the government's enforcement policy.

Notwithstanding the attempt of anti-prohibitionists to place the heavy responsibility of lawlessness upon the, to them, unpopular prohibition law, one must question how relatively large a factor it would be if deprived of the publicity and other elements deliberately designed,

even by many otherwise law-abiding citizens, to encourage its violation and to render it unpopular. The attempt is contradicted by the fact that lawlessness very much antedated this law, and that the liquor interests were important factors in the far from ideal conditions that existed before its passage. Near events loom large in the vision, but there were certain outstanding evils of a former generation which are partly overcome and largely forgotten.

Like other social problems of importance there is evidence that the roots of lawlessness draw their sustenance from many soils. Laws, unwise, hasty, absurd, too advanced, "blue laws," trivial laws, improper laws, and others ill-advised have contributed to irritation and resentment, and have opened the door a little wider to the disrespect for authority. Administrative ills have been at fault, also, abuses of official position and power, miscarriages of justice, inefficiency or over-technicality of courts, lagging of justice, prosecutors, lawyers, political corruption, over-riding of rights by the police, the denial of the fundamental and prized possession of civil liberties, which imply a healthy and legitimate regard for rights, the toleration of abuses and advantages by capital, corporations, and wealth, the degradation of position and office for personal ends. These and other like trends, concerning which many instances will come to mind, to some extent influence revolt against and questioning of forms of authority and law. Nor are public opinion and the citizenship of the nation free from responsibility.

When law has failed, history records that extra-legal methods of law enforcement have been instituted, and self-constituted organizations such as popular tribunals, private societies, vigilantes, and the more recent and familiar Ku Klux Klan have arisen, not to speak of the still existing and deplorable blot of lynching.

Of the means of improving conditions and restoring confidence in the law it would be futile at this time to speak. Every ill in the body politic, whether at large

or in the legislative, judicial, administrative, penal or other division suggests its alleviation. Many commissions and other organizations have been formed and are giving expert and searching study to the crime problem and court procedure, including the National Crime Commission organized in 1925. The Bar has long been active in trying to improve conditions. The American Law Institute was organized at Washington, D. C. in February 1923, to promote the clarification and simplification of the law, secure better administration of justice and carry on scientific legal work. Discussions of crime and criminology, from the prevention and apprehension of offenders to the dealing with convicted persons, have been copious. No attempt can here be made to include an adequate presentation of these phases.

The appointment of the Hoover Commission on Law Observance and Enforcement was completed May 20, 1929, and was made up of eleven members under the chairmanship of George W. Wickersham. The intended field of study was divided among eleven committees, representing causes of crime, statistics of crime and criminal justice, police, prosecution, courts, penal institutions, prohibition, juvenile delinquency, criminal justice and the foreign born, lawlessness, and the cost of crime. Experts and consultants were further selected to facilitate the work of the several committees. The Commission was expected to investigate for two years, and to cost $400,000. Its first preliminary and supplementary reports were made on January 13, 1930, part of its recommendations being reprinted in this volume.

That law is the very bedrock of our social and political life in its broadest sense there would probably be few to dispute. That respect for law as such foundation is essential to its best health, well-being and progress, must also be largely evident. The Honorable Rousseau A. Busch, Justice of the Supreme Court of Kansas, has written:

Each step in the development of man has been buttressed and forwarded by law. The clan, the tribe and the nation were made possible only by virtue of what were essentially bonds of legality. What the rules were made little difference, so long as they secured cohesion and cooperation; and out of the prescriptive governability the inherited disposition to submit to the laws, which early forms of social organization inculcated, has come the progress of all civilized people.

Yet, notwithstanding such claim of law to support, as George W. Kirchwey says in the *Survey* for March 1, 1926.

We preach the sacredness of law and in the same breath excite a civic lawlessness which converts the American scene into a guerilla warfare between two equally lawless elements of the community.

Thomas R. Marshall, former Vice-President of the United States, has written of the "automatic citizens" who are the salt of the Republic and who make for righteousness, who realize the duty of individual responsibility. It is not too much to assume that in a society composed of such individuals, with such vision in their minds and hearts, the problem of law enforcement would soon become archaic.

# PART I

# LAW

## REIGN OF LAW[1]

The history of law is the history of man and the development of law marks the progress of civilization. An all wise Providence, long before there was history to record, established the principle that man should, for himself, discover, declare, administer and enforce the rules controlling his conduct as a social being. The whole course of human society is the history of the struggle, not merely for the recognition of rights, but more, and chiefly, for the establishment and administration by law, of a just and equal order among men. The rules and sanctions of social conduct so to be discovered, declared, administered and enforced by man are subject to the frailty of all human institutions. At times they are only partially perceived, often improperly declared, and on occasions, imperfectly enforced, but this circumstance has never deterred men from a continuous and earnest search to discover and apply the true principles governing the conduct and administration of organized society. On the other hand, the fact that there is a function and a duty thus imposed upon man, ennobles man himself and dignifies all his institutions.

Of law there can be no less acknowledged than that her home is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her reverence; the least as feeling her care, and the greatest as not exempt from her power.

[1] From address of Donald C. McCreery, of Denver, President of the Colorado Bar Association. *Colorado Bar Association.* Report, 1928:97-112.

This sublime conception of the law and of its scope and function, applicable not alone to the laws of nature, but to the laws of man as well, has given throughout the centuries magnificent progression to the institutions of men. The great events, movements and institutions of history thus become the relay of its unseen forces, accelerating the progress of society, nationality and humanity. This conception involves the presence of the divine and providential co-working with man for humanity; and so these things and their larger purposes and results are not to be viewed solely either as the devices of men or as the inexorable unfolding of nature herself. Thus the laws of man are seen to be the unfolding of the laws of the Eternal, when founded on a true understanding of natural tendencies and a just appreciation of the results to be attained.

Organized society, the state, the nation, therefore, is not to be regarded as an artifice which man has devised, nor yet as an expedient suggested by circumstances to secure certain special and temporary ends. It has other foundation and other elements. The idea of organized society did not originate in the mind of any individual. Nor was it the invention of any age. Its roots were planted in the very nature of man. History does not show a time or clime in which there has not been the recognition of some common relation, dependence or association of men together in what may be termed "the civil state," however crude its structure or loose its bonds. Men have always made sacrifices for it and have always accepted obligations under it.

Law, as declared, administered and enforced by man, commonly called the civil law, is the authoritative human will enforced by power. The occasion for it is the conflicting actions, demands and inclinations of men, which must be adjusted and controlled to produce order and a reasonable degree of satisfaction if civilization is to exist and progress. Every law is intended to act as a restraint

upon the activities of those coming within its scope and to interfere with the motives by which their conduct otherwise would be determined. This is a fundamental and vital conception underlying all institutions and government alike.

The civil state thus conceived consists not only nor chiefly in its far flung battle line, its domains or its numerous subjects, but in its history, its institutions, its progress and its conscious moral life, as the natural and fundamental institution of organized society. The nation is the arena of history. It is there that the struggle for government—just, equitable, reasonable and certain—has been waged. Such government has not been developed by one age or country. A multitude of nations were needed. Ages were necessary. States, kingdoms and principalities have trooped across the stage in the onward, irresistible and destined tread of civilization and have contributed to the grand and final result of the establishment of the principle of government by law. It is as impossible to separate and dismember this history of law and the universal principles of moral order, as to separate the families of men or disintegrate the nations of the earth. The great book of law has thus been gathered from all countries, ages and civilizations and in its pages is found the experience of fifty centuries, teaching us knowledge that we may gain wisdom. So built and evolved, the law is not good because it is old, but is old because it is good; because it has stood the test of time and circumstance and has established justice and promoted the general welfare. Such was the growth of the common law, wherein the principles of law and government, found by long and arduous experience to be sound and good, became the very structure of English and American legal institutions. And the enduring foundation upon which the whole structure rests is the principle of government by law.

## CITIZEN'S PART IN GOVERNMENT[2]

The theory and practice of government have vastly changed within the past few centuries and especially within the last century and a half. Control by superior authority, claiming by divine right, selected by inheritance, and supported by a comparatively small governing class selected in the same way was repressive and directive. Government was then apart from the main and general activities of life, but it was apart from them by being above them, by exercising rights over them and making them all pay tribute. Under our modern systems of popular government the repressive function still continues, but entirely new and different modes of action have been developed. The repression is self-repression, and the direction is the resultant of internal forces determining the character of the directed mass. Popular government is organized self-control—organized capacity for the development of the race. It is the good and noble impulses and the selfish and cruel passions of man struggling with each other for the maintenance or the denial of justice; it is the lust for power and savage instinct for oppression struggling against manhood and self-respect for the maintenance or destruction of liberty; it is the greed and cunning that have shamed the history of the world struggling with honesty and virtue for public purity; it is the longing in the heart of man for better things up through education to broader knowledge and higher life; it is the vast elemental forces of humanity moving great masses of men in violent protest against the ills of life, to the destruction of social order; it is the instinct of self-preservation which rallies other multitudes in defense of vested interests and traditional rights; it is the dreams of utopia to be realized by changing everything and the reverence for the past that is horrified by changing anything. These tremendous forces

[2] From Elihu Root. *Addresses on Government and Citizenship*. p. 3-19. Harvard University Press. Cambridge. 1916. Copyright. Published with permission.

express themselves in laws, in the enforcement of laws, in contempt for laws, in good administration and bad administration, in sudden outbursts of feeling altering the surface of things, and in gradual movement affecting the whole relation of nations toward the ideals of peace and order and justice and righteousness. Upon them and the results they work out depend the prosperity, and honor and life of nations, and the future of civilization; and upon them depends the value of every farm and factory and shop, of every bond and share of stock, the peaceful prosperity of every home, the opportunities for success of every child.

Heavy responsibilities were assumed and serious dangers were confronted in departing from the theory that government must come from above, that the selfishness and cruelty and lust of mankind can be successfully controlled only by a class of superior men, by a small number of specially qualified experts in the art of government bred to power and trained in its exercise; and in adopting the idea that the great masses of men, who had always been subject to repression, control, and direction, could be trusted to govern themselves without any superior control; that by a process of evolution, through education and practice, the popular mass would acquire the self-restraint, the soberness of judgment, the loyalty to the fundamental principles of justice and liberty necessary to stable and effective government. The new departure was regarded by many of the wisest and best of mankind with the most gloomy forebodings. There was widespread belief that when political power was vested in the poor they would promptly proceed to divide among themselves the property of the rich, and that the control of democracy would prove to be the tyranny of the mob—the most frightful form of oppression mankind has yet known. Jack Cade and Wat Tyler rebellions, peasant insurrections, the Red Terror of the French Revolution, the excesses of the Commune of

Paris, the reign of assassination in Russia, the Jacquerie in Roumania, the perpetual revolutions of undeveloped Latin-America, have seemed to give color to these anticipations.

One thing we have learned during the experience of popular government is that the progress of the world has carried civilized people to a point where we are not now voluntarily trying the experiment of government by self-control, but where society must rely upon that and cannot possibly go back to the old method of keeping peace by force or the threat of force. The complication and interdependence of life puts the power of doing incalculable harm in the hands of so many men and combinations of men in different occupations that a realization of common interest is absolutely essential to the working of the vast machine. The mere forcible enforcement of law is quite inadequate. It is not fear of the policeman or the sheriff that keeps the peace in our many cities; it is the self-control of the millions of inhabitants enabling them to conform their lives to the rules of conduct necessary to the common interest; it is only against the exceptional lawbreaker, and criminals who are comparatively few in number, that the policeman and sheriff are effective.

Another thing we have learned is that it is possible for men to set up abstract and impersonal standards of right conduct, such as the great rules of right embodied in our constitutions, and that, although each man in his own personal affairs tends to depart from the standard and struggle against its application to himself, the general agreement of all who do not at the time happen to have any adverse interest is competent to maintain the standard in force and effect; so that all men may give their adherence and support to standards of conduct ethically superior to the course which the vast majority of them desire to take in their own affairs.

Another lesson the experience of popular government has already made plain is that the art of self-government

does not come to men by nature. It has to be learned; facility in it has to be acquired by practice. The process is long and laborious; for it is not merely a matter of intellectual appreciation, but chiefly of development of character. At the base of all popular government lies individual self-control; and that requires both intelligence, so that the true relation of things may be perceived, and also the moral qualities which make possible patience, kindly consideration for others, a willingness to do justice, a sense of honorable obligation, and capacity for loyalty to certain ideals. Men must be willing to sacrifice something of their own apparent individual interests for the larger interests of city, state, country; and without that willingness successful popular government is impossible. This loyalty to an abstract conception is a matter of growth. It is easy to trace its development in our own country from the time when local allegiance was predominant to the time when national allegiance has become predominant. Intense devotion to the state is one of the great elements of strength in the Japanese nation now; it was one of the chief elements in the growth of Roman power. It cannot be produced except by a long-continued habit of effort and sacrifice in a common interest. It is this gradually acquired loyalty to country more than anything else that enables men to exercise the self-control necessary to the subordination of the narrower personal interests to broader general interests, upon which self-government depends. The individual selfishness which fills men with a controlling desire for personal aggrandizement, to the exclusion of any consideration for the general good, marks a low stage in the political development of every country that has a history; and the bitterness of internal dissension which leads the adherents of particular opinions or interests to insist upon them at the cost of ruin and death to adherents of opposing views in the same country must in its turn give way to the conception of the higher

loyalty before there can be really successful popular government. There must be both the habit of self-control and the dominating influence of the common ideal to enable men so to act together, subordinating minor differences of interest and opinion, as to make popular government possible.

The countries in which the people are continually engaged in internal quarrels never progress. History is full of such examples. Some races appear to be incapable of combining in the support of a common political ideal beyond a certain point. The races that have this capacity to the highest degree persist and rule the world; the peoples that have it to a low degree lose their national entity and cease to govern. There are many countries now where controversy regarding matters of inferior importance is a present bar to progress. In every living nation the question always remains. How far has it capacity to go in that kind of combined action which subordinates individual interests, the interests of groups and localities and classes, to the general good of the country? That limit must be found in the capacity for development of the individual characters that make up the nation.

The essential feature of the present condition is that the burden and duty of government rest upon all men, and no man can retire to his business or his pleasures and ignore his right to share in government without shirking a duty. The experiment of popular government cannot be successful unless the citizens of a country generally take part in the government. There is no man free from the responsibility; that responsibility is exactly proportioned to each man's capacity—to his education, to his experience in life, to his disinterestedness, to his capacity for leadership—in brief, to his equipment for effective action in the great struggle that is continually going on to determine the preponderance of good and bad forces in government, and upon the issue of which

depends results so momentous to himself, his family, his children, his country, and mankind. The selfish men who have special interests to subserve are going to take part; the bitter and malevolent and prejudiced men whose hearts are filled with hatred are going to take part; the corrupt men who want to make something out of government are going to take part; the demagogues who wish to attain place and power through pandering to the prejudices of their fellows are going to take part. The forces of unselfishness, of self-control, of justice, of public spirt, public honesty, love of country, are set over against them; and those forces need every possible contribution of personality and power among men, or they will go down in the irrepressible conflict. The scheme of popular government upon which so much depends cannot be worked successfully unless the great body of such men as are now in this room do their share; and no one of us can fail to do his share without forfeiting something of his title to self-respect.

## POSITIVISM AND IDEALISM IN THE LAW[3]

If we view the law as an effort to regulate life in accordance with ideals of justice and morality, we are bound to admit at least three types of limitations.

The first limitation arises from the indetermination inherent in our very ideal of justice. It is a common illusion to suppose that for all questions that can possibly arise our ideal of justice determines a specific answer. Our ideals are in fact much hazier than we ever care to admit.

We all begin by accepting the judgments prevailing in our community. Popular judgments and proverbial wisdom, however, though they may contain a kernel of enduring truth, seldom express it with a high degree of

[3] From article by Morris R. Cohen, College of the City of New York. *Columbia Law Review.* 27:240-50. March, 1927.

accuracy or consistency. It is because of this vagueness and inconsistency in popular judgement that science is needed as a corrective. The greater simplicity of their subject matter, the more definitely elaborated technique, and a certain amount of ethical neutrality as to their result, enable the natural sciences to depart from popular opinion to a far greater extent than it is possible in the social sciences. This, together with the natural difficulty of seeing any justice in doctrines or sectaries abhorrent to us, makes the elaboration of a consistent ideal of justice one of the utmost difficulty. That this difficulty has not been fully overcome in treatises on ethics, natural law or legal philosophy, becomes obvious when we ask: What precisely is the content of justice and on what evidence are its disputed claims based?

The classical legal definition of justice makes it consist in rendering everyone his own: *suum cuique tribuere.* But what is rightly anybody's own is precisely the problem which the law must determine according to some principle of justice. Otherwise the just becomes simply the legal and there is no possibility of unjust law.

If we go to books on ethics we are told that justice accords to everyone that which he has earned, or that a just law protects everyone in the enjoyment of the product of his labor. But what in a cooperative social state is the product of any man's labor? In practice this is settled somewhat arbitrarily, by appeal to the law which happens to exist. Moreover even if we could determine on principle what is the product of any one's labor it would be very doubtful morality if one could keep it all when others, the sick, the infant, or the very aged, were to perish because of the exercise of this right.

That legal justice in some way demands the principle of equality seems certain. But what exactly do we mean by equality before the law? In the end nothing more than fidelity to the classification that the law has already

laid down. If all creditors are to share alike in a bankrupt's estate, equality before the law means that the judge must not favor any one party. Obviously, this does not enlighten us as to whether the classification that the law has created is itself just. Should not the law give certain creditors precedence, for example, those who are creditors of a railroad by virtue of having suffered bodily injury? Legal justice is formal. It is important that the law, once created, should be justly, i.e. faithfully, administered. But it is also important that the law should be just in content to begin with and purely formal considerations are insufficient to determine this.

Our second limitation of legal idealism [is] the inevitable imperfections in the human beings that have to make, to enforce, and to obey the law.

We may view the limitations of imperfect human nature (1) from the point of view of the legislator, (2) from the point of view of those who have to obey the law, and (3) from the point of view of those who have to enforce it or operate the legal machinery.

The obvious fact which no glorification of law can obscure is that it is made by human beings subject to the limitations of human ignorance and of inadequate sympathy or good will.

(a) The ignorance of the legislator may relate to the end of the law which he helps to bring about. , Moved by the demand for the redress of some grievance, the legislature enacts a statute. But changing the law is like making a change in the intricate plot of a highly organized drama. You cannot change one part without other parts being affected in unexpected ways. Legislatures thus seldom have an adequate idea of what they intend to bring about. The Napoleonic Code intended to guarantee that all the children shall have some part of the patrimony. Did its authors have any idea that they were erecting a check to the growth of population?

(b) Assuming that the legislator knows what effect he wants to produce, he may be ignorant of the natural circumstances involved. All sorts of scientific facts have to be assumed in modern legislation. Our southern legislatures feel competent to pass on the truths of biologic evolution and one of our western states came near decreeing some absurd value for $\pi$. All our state legislatures feel competent to pass on the truths of history to be taught in the public schools. Modern states all contain heterogeneous elements. Hence laws applicable to a vast majority may be absurd for some groups or regions—e.g., trial by jury in those United States possessions inhabited by Negritos. Rural legislators do not know or sympathize with urban industrial life and city legislators do not always understand the conditions of farm life.

(c) Of special importance is the imperfect power of the legislature to control the subsequent interpretation of its enactments. The legislature can express its intention only in general terms. It cannot foresee all actual cases. It cannot therefore completely control the interpretation and application of its statutes by courts and administrators bent on making the law serve other and wider purposes. The legislature generally looks to the removal of a specific abuse while the judge and the jurist must look upon any statute as a part of the whole legal system. Thus the first legislatures that wished to change the common law as to the property rights of married women were repeatedly defeated by courts that persisted in thinking of these statutes in terms of the traditional common law.

That in a democracy the law is the will of the people is a statement not of a fact but of an aspiration that ought to be true. A great deal of the law is and necessarily must be the work of legislatures, courts and jurists whose work is seldom fully known to the majority of the people. Indeed, as to rules of conduct on which

people are fairly unanimous there is no need for the enactment of any law. Enacted law represents the will of some part of the community and the rest obey either out of respect or by force of habitual obedience to regular authority. Yet neither legislatures, courts, or jurists, nor all combined are omnipotent. There is no way of securing perfect obedience where there are strong human motives for disobedience or evasion.

The failure of the law to secure obedience has been historically shown in at least four fields of human life.

(a) In the field of religion. The persistence despite persecution of the Christian churches in the early Roman Empire, of the Jews and Christian dissenters in Russia, England, and elsewhere, shows how persistently small minorities may defy and defeat the law.

(b) In the field of personal morals. This has always been a favorite interest of the law, but its failures in this field are proverbial. It is true that sumptuary laws have often been generally obeyed, *e.g.,* in the Middle Ages. But this happened only so long as they conformed to the general moral feeling of mediaeval society. When they cease to express a strong moral consensus they cease to be effective. Take for instance the case of the New York law which makes adultery a crime. Though many thousands of divorces have been granted for that offence there seem to have been hardly any convictions for the crime. As a criminal law it is a dead letter. Yet any proposal to repeal it would meet with widespread resentment. The majority of the people of New York State emphatically wish the statute book to express their disapproval of adultery. Why, then, has there been no enforcement of it? The answer is to be found in the inherent difficulty of enforcement. It is an unpleasant and unedifying thing to bring into court. Moreover it is extremely doubtful whether convictions would greatly reduce the number of actual offences, or result in more good than harm.

The experience of our national prohibition law and the many evils which its enforcement involves, especially the violation of the law by the very agents of the government, are too flagrant to need anything but bare mention here.

It is interesting, however, to reflect that these evils are not merely contemporary. Long ago a most detached philosopher, Spinoza, wrote the sentence at the head of this paper. He also observed:

> Many attempts have been made to frame sumptuary laws. But these attempts have never succeeded in their end. For all laws that can be violated without doing any one an injury are laughed at. Nay, so far are they from doing anything to control the desires and passions of men, that, on the contrary, they direct and incite men's thoughts the more towards those very objects; for we always strive for what is forbidden, and desire the things we are not allowed to have. And men of leisure are never deficient, in the ingenuity needed to enable them to outwit laws framed to regulate things which cannot be entirely forbidden. . . . My conclusion, then, is that those vices which are commonly bred in a state of peace . . . can never be directly prevented but only indirectly. That is to say, we can only prevent them by constituting the state in such a way that most men will not indeed live with wisdom (for that cannot be secured simply by law), but will be led by those emotions from which the state will derive most advantage.

(c) Similar failure can be seen in the field of economics. The repeated failures of attempts to regulate wages by law, to prohibit mergers or trusts, to prevent railroads from having an economic interest in the products they carry, all illustrate how difficult it is to prevent evasion of the law by those who have a strong interest in doing so.

(d) In the political sphere we need only mention the failure of the fourteenth and fifteenth amendments to the United States Constitution to secure civil and political equality for the negro. Mr. Horwill has recently called attention to the many ways in which Congress and the Executive evade the provisions of the Constitution, *e.g.*, the failure to reapportion congressional representa-

tion after the census of 1920. The most interesting of these evasions is by what he calls "discreet nomenclature," *e.g.*, evading the duty of submitting a law for presidential approval by calling it a concurrent resolution, etc.

There can be no doubt that the framers of the United States Constitution intended the Electoral College to serve as a barrier against the influence of political parties in the election of the president. This purpose has been defeated without changing the constitutional law, by the extra-legal device of the political convention.

Dean Pound has treated this topic with his usual thoroughness in an essay on *The Limits of Effective Legal Action* and I may add only a few remarks. Legal machinery, we must remember, never operates apart from human beings, judges, juries, police officials, etc. The imperfect knowledge or intelligence of these human beings is bound to assert itself. It is therefore vain to expect that the legal machinery will work with a perfection that no other human institution does. We cannot expect results too fine for the discrimination of the ordinary juryman. A great deal of injustice cannot be prevented by law because the attempt to do so is bound to produce greater evil than it can cure. I think that the action for breach of promise to marry well illustrates this. Apart from the injury to public decency from the fact that this action is so often used purely for blackmail, it is a bad policy for the law to put a monetary value on the marriage promise and to seem in any way to force people into the marriage relation when the churches so strenuously insist that no matter what promises have passed between the two parties there shall be no marriage performed unless both parties are perfectly willing at the time of the ceremony.

It would be foolishness to contend that in the various fields mentioned, law has never been effective. Few injustices are absolutely beyond all human effort, if we are

willing to make sufficient sacrifice to remove them. But it is folly to center our attention on some result desirable in itself and ignore the fearful cost of incidental consequences required to attain it.

We conclude then that in view of the necessary limitations of any legal system and the many insuperable difficulties in the way of enforcing all sorts of moral considerations, it is a wicked stupidity that insists on absolute justice regardless of consequences. *Fiat justitia pereat mundus* is the device of the fanatic, too lazy to think out the consequences of his position. The more human wisdom is summed up in the saying, *summum ius, summa injuria.*

The third limitation of legal idealism is due to the fact that legal justice must operate with abstract general rules. To guarantee equality before the law and eliminate favoritism or partiality, the law must operate with rules that are to apply to everyone. No one is allowed to beg in the street whether he be poor or rich, strong or sick, young or old. Anyone under twenty-one years has certain privileges in connection with contracts, no matter how developed intellectually or in the way of business experience. The injustice which this abstract uniformity works in particular cases has generally been recognized and many efforts are made within the legal system to correct it by some form of individualization, *equity, or* ἐπιείκεια. This individualization itself, however, becomes subject to rule or else it remains lawless. The demand for abstract uniformity of legal rules is intensified by the fact that a developed legal system must assume a scientific form and that it can do so only as other sciences do, namely by the discovery of principles in terms of concepts so that multitudes of rules can be deduced from a few such principles. This abstract universality of legal rule is necessary to secure certainty. It ministers to a certain sense of justice which may be viewed as the rationalization of jealousy. But all rigid rules applied to life tend to suppress favorable as well

as unfavorable variation. At times it becomes obvious that it is only the better element of a community that suffers from certain laws, while the worse elements evade or successfully defy them. Thus, while the law cannot admit the sovereignty of individual conscience without opening the door to anarchy, it must also recognize that individual conscience may be a much more delicate instrument for moral apprehension, so that to suppress it is to bar the way for more enlightened justice. This inherent difficulty of legal justice, like other difficulties of social life, is not overcome by the Hegelian trick of making *Sittlichkeit* or social ethics supersede the morality of conscience.

An uncritical reliance on the abstract universality of legal justice is the crowning ethical defect of the so-called critical philosophy. It legalizes ethics without moralizing the law. It formulates its imperative in the abstract legalistic manner to the neglect of individual differences. Thus Kant's argument that it is always wrong to tell a lie, even to save an innocent life from a foul murderer, is a striking example of legalistic ethics. In the end it is based on bad logic as well as on moral insensitiveness, as is Kant's horrible view of marriage as a lease.

Universality and individuality, like other fundamental antithetic categories, are the poles of human thought. They can neither be separated nor identified. Positivists fail in trying to separate positive law from all ideals, and Hegelians fail in trying to identify the ideal with some form of the actual, whether Prussian or other state.

The deeper and more ancient reason is to recognize that divine perfection is denied to human beings in legal as in other practical affairs. It is romantic foolishness to expect that man can by his own puny efforts make a heaven of earth. But to wear out our lives in the pursuit of worthy, though imperfectly attainable ideals, is the essence of human dignity. Reflection on the limits of law thus brings us to religion as a doctrine of how to live in a necessarily imperfect world.

## THE COMMON LAW[4]

What would a skilled observer select as the distinguishing qualities, the peculiar and characteristic notes of the common law?

First, its firm grasp of the rights of the individual citizen. He is conceived of, he is dealt with, as a center of force, an active atom, a person in whom there inhere certain powers and capacities, which he is entitled to assert and make effective, not only against other citizens, but against all other citizens taken together; that is, as against the state itself and its organ, the executive government.

Secondly, its recognition of the state and the executive as clothed with the authority of the whole community, as being an effective power, entitled to require and compel the obedience of the individual wherever and whenever it does not trespass on the rights which are legally secured to him. To be effective, law must have not only executive force behind it, but also the principle of legitimate authority, the sense in every citizen that his individual free will has its limits, and can be exerted only within the sphere allotted to it. Liberty is the child of law. It is not his own pleasure, but the fact that the community has recognized a certain sphere of unchecked action as belonging to him, within which he can do as he pleases, that secures the citizen in his rights. Outside that sphere he must not only obey, but cooperate with the executive. It is his duty to aid in preventing a crime, in suppressing disorder, in arresting an offender. A sheriff exercising his functions can call on all persons present to support him, and they are bound to support him, a wholesome and, if you like, a democratic doctrine.

[4] From article The Influence of National Character and Historical Environment on the Development of the Common Law, by James Bryce, British Ambassador to the United States. *American Bar Association. Report*, 1907: 445-50.

These two principles go together. The one is a safeguard against tyranny, *i.e.,* the absolute and capricious will of the governing power, the other against anarchy, *i.e.,* that unrestrained and unlimited exercise of the will of each and every citizen which must result in collision and disorder.

It may be suggested that these two principles are not peculiar to the common law, because no law could grow up, no state could prosper, without both of them. That is true. But there have been systems of law in which sometimes the one, sometimes the other principle, was imperfectly developed, and (so to speak) overweighted by the other. The former principle especially (viz., the recognition of the rights of the citizen) has often been quite too weak to secure due protection to the individual man. It is the clearness with which both have been developed, in the mediæval and post-mediæval English law that constitutes its highest merit.

From the equal recognition of these two principles there follows a third characteristic. If principles apparently antagonistic are to be reconciled, there must be a precise delimitation of their respective bounds and limits. The law must be definite and exact. Now precision, definiteness, exactitude are features of the common law so conspicuous that the unlearned laity sometimes think they have been developed to an inordinate degree. They have made the law, not only very minute, but very technical. But of this anon.

With the love of precision there naturally goes a love of certainty and fixity. The spirit of the common law is a conservative spirit, which stands upon what exists, distrusting change, and refusing change until change has obviously become necessary. *"Stare super antiquas vias"*: *"Nolumus leges Angliae mutari"*: "It is better that the law should be certain than that the law should be just." These were favorite dicta among the lawyers of the old school in England.

The respect for what has been settled, and the desire that what has been settled should be definite in its terms, import a deference to precedent. No legal system, not even the Mussulman law, grounded on Koranic interpretation and traditions, has ever gone so far as the common law in basing itself on cases judicially determined and recorded.

Judicial decisions are given, legal precedents are made, as events bring them. There is no order among them except the chronological. Thus a law constructed out of them is necessarily wanting in symmetry. The common law is admittedly unsymmetrical. Some might call it, as a whole, confused, however exact may be the propositions that compose it. There are general principles running through it, but these are often hard to follow, so numerous are the exceptions. There are inconsistencies in it, where decisions apparently conflicting have been given by different authorities at different times. There are gaps in it, where no decision has happened to cover a particular set of circumstances. Thus there has been formed a tendency among lawyers to rate principles, or let us say, philosophical and logical views of the law, very low compared with any positive declaration made by a court. The maxim, "An ounce of precedent is worth a pound of principle," still expresses the attitude of the profession in England and very possibly here also.

With the love of certainty and definiteness there goes a respect for the forms of legal proceedings and for the precise verbal expression given to rules. This is a quality which belongs to most legal systems in their earlier stages. In the common law it held its ground with great pertinacity till very recently both in England, and here; nor am I sure that it is not now strong in some of your states, possibly stronger than in the England of today, in which, especially since the Judicature Act of 1873, the distinctions between forms of actions are being forgotten.

You may think that among the features that charac-

terize our common law I ought to name the love of justice and also the fondness for subtle distinctions. I do not, however, dwell on the latter of these, because it belongs to all legal systems that reach a certain point of development, and is even more evident in some others than in our own. The robust common sense which is inherent in the common law seldom encouraged fine distinctions to go beyond a certain point. As for the love of justice, it belongs to mankind generally, and to all systems of law. Such differences as may be noted between different peoples consist not in the reality of the wish to give every man his due—*suum cuique tribuere,* but in the self-control which prevents emotional impulses from overriding justice, in the practical sense which perceives that to allow the forms of law to be neglected or unusually harsh treatment to be inflicted where a cause or a person happens to be unpopular, is really to injure the community by impairing the respect for law itself and the confidence in its administration. Englishmen and Americans may claim that although, like others, they have sometimes lapsed from the right path, they have, on the whole restrained their passions from trampling upon justice, and upon the regular methods of securing justice, better than most nations have done.

The foregoing characteristics of our common law are submitted for your consideration, not as being the only ones which belong to it, for others might be added, but as being characteristics so broad and salient as to make it comparatively easy to discuss them and to endeavor to account for them. Some are found in all systems that have reached a high level of scientific development, being indeed qualities without which no system could be deemed excellent. Only one other system, the Roman, possesses them in so large a measure as to deserve comparison.

To what are we to ascribe these features distinctive of the common law? The in-dwelling qualities of the race of men who built it up must have been a principal and

indeed the primary cause. The mind and character of a people are indeed more exactly and adequately expressed in and through its law and institutions than they are through its literature or its art. For books and paintings are the work of individual men, many of whom may have been greatly influenced by foreign ideas or foreign models; and some of whom, powerful enough to influence their successors, may not have been typical representatives of the national genius. But laws are the work of the nation as a whole, framed indeed by the ruling class, and shaped in their details by a professional class, but to a large extent created by other classes also, because (except in those few cases where a conqueror imposes his own law on the vanquished) the rules which govern the relations of the ordinary citizen must be such as fit and and express the wishes of the ordinary citizen, being in harmony with his feelings and fitted to meet the needs of his daily life. They are the offspring of custom, and custom is the child of the people. Thus not only the constructive intellect of the educated and professional class but the half-conscious thought and sentiment of the average man go to the making and moulding of the law. It is the outcome of what German philosophers call the legal mind (Rechts Bewusstsein, or legal consciousness) of a nation.

But law is the product not of one or two generations but of many. National character is always insensibly changing, and changing more rapidly the more advanced in civilization the nation becomes, the greater the vicissitudes in its fortunes, the more constant its intercourse with other nations. Hence institutions become the expression not solely of those original gifts and tendencies of a race or a people which we observe when it emerges from prehistoric darkness. Time and circumstances cooperate in the work. Law is the result of the events which mould a nation as well as of the mental and moral qualities with which the nation started on its career.

These two elements are so mixed and blent in their working that it is hard to describe them separately.

## LAW AND ECONOMIC LIFE[5]

The great function of law is to establish and maintain the rights, duties, and liberties of men living together in society, primarily in matters which require the pronouncing of formal judgments and the backing of them up by the ultimate force of the community. It is to tell people what they *must do* and what *they must not* do, thereby establishing conditions in which they *may do* whatever is essential to their welfare. It affords a framework of prescribed behavior within which the voluntary behavior shall take place. Its commands extend from things so important that life is not safe without them to things so unimportant that people are willing to do as they are told and feel no material constraint. Its proper field is that in which certainty of human behavior is worth the cost of compulsion; and this may be either because the behavior is very vital or because the cost of compulsion is very small.

Law arises out of the need of settling disputes; hence its very nature is the defeating of certain interests that others may prevail. Ultimately it becomes an instrument for furthering the general purposes and ideals of the community, but always it faces the necessity of defeating certain interests. Dean Roscoe Pound notes four stages in the evolution of the juristic ideal of justice: first, the mere keeping of the peace; second, the maintenance of the *status quo;* third, a maximum of individual self-assertion; and fourth, social justice. The first is primitive law (our present attempts at the control of the labor relation appear to be largely in this stage of development), and its relation to justice or welfare is mainly involun-

[5] From article by J. M. Clark, University of Chicago. *University Journal of Business.* 3:350-70. September, 1925.

tary: it must conserve them to whatever extent may be necessary to maintain order and stability. Even a selfish government violates this rule at its peril. It must pay some attention to those principles which are essential to enable human beings to live together, and to this extent law is a social science whether it wants to be or not.

The second stage is the medieval age of law, in which people's customary stations in life were thought of as divinely appointed, and whatever was suitable to these stations was therefore right. The third stage is the democratic-individualistic stage, which dominated the nineteenth century. No one is born to a station in life, but all are born to an equal and absolute liberty to carve out their own stations—this in a period when the opportunities for doing that thing were unrivaled. Here the glory of the law is that it is the same for all, and there is a tendency to forget what earlier judges remembered: that in bargaining between parties of vastly unequal resources, formal equality at law does not produce an equal bargain. The fourth stage, that of social justice, implies a justice based on a real study of social relations and the social consequences of its rules, rather than on a too sweeping dogma of the supreme worth of absolute liberty. It softens the ideal of maximum self-assertion to maximum self-realization, recognizing that this is cramped by undue self assertion on the part of others and that it is best promoted by rules that are not the same for all, but are differentiated according to the injuries to which people's economic position renders them liable. This differentiated justice is called for, not by the different stations to which men have supposedly been called by birth or divine decree, but chiefly by the relations they have voluntarily assumed toward others, or simply by the need of differentiated functions in our complex society.

A law is defined as a rule of action backed by that compulsory power which is an essential mark of sovereignty. Compulsion implies the power to impose virtually

unlimited penalties if the rule be centralized. Rivalry in this matter spells anarchy, and whatever body exercises this supreme power is, by that very fact, the sovereign body. A rule implies something general in its application, not a special act for the benefit or injury of one person or one arbitrarily selected group. The general functions of law are: to make known the will of the sovereign; to enforce it by the power of the whole society over its members; to regulate the use of this compulsion so that it may be uniform rather than arbitrary, and not a respecter of persons (this is a large part of what is meant by "a government of laws and not of men"); to lend customary morality the force of compulsion where needed; and to educate this morality and to turn against newly discovered evils the force of moral reprobation that goes with illegality.

This double relation between law and morality is an interesting one. The things the law forbids are prevailingly well-recognized evils which common morality has long condemned. This helps good people to develop a righteous horror of any illegality, and this can be used in turn (if it is not overworked) to transfer their moral condemnation to something they had not realized was wrong, by making it illegal.

The main sources of the law are three: custom, adjudication, and legislation, and these three sources are of co-ordinate importance. The law of commerce received its shape by being built upon the customs prevailing in the mercantile world. Custom also comes to have the force of law in other cases, although nowadays the court generally tries to discover some legal decision recognizing a given custom and furnishing a precedent more tangible than custom itself. However, when people in the business world enter into the relation of contract, and some question arises not specifically provided for and requiring interpretation, the court will assume that the intention was

to follow the custom of the trade," and so will give that custom the force of law.

Many people fail to realize to what a large extent law is made up by the decisions of the courts. New issues are continually coming up which are not exactly covered by existing statutes or previous decisions. In such cases the courts try to apply some recognized principle to the new situation, but in so doing they frequently develop what are really new doctrines. Thus the law evolves, and new laws are virtually made to meet new needs without any legislative action. This process, however, does little to change existing law where existing law applies and in general it moves too slowly to meet all needs. Moreover, the remedies which a court is in a position to bring to bear are largely negative in character, punitive rather than preventive and constructive. Hence legislation is needed to produce more rapid and certain results, to record the will of the people and prevent the courts from usurping sovereignty, to take action which looks to the future and is not retrospective, and to enlarge the scope and constructiveness of the remedies applied. A new doctrine of law laid down by the courts is always laid down by the very act of being applied to a particular case, and hence it is nearly always retroactive, at least in respect to the case in hand. Such conditions make radical changes more than usually unjust and conservatism more than ordinarily advisable.

Legislation for the future is free from this difficulty and therefore can fairly take up the main burden of changing the law, leaving the courts to develop a natural professional bias toward conservatism. But when a statute is passed, the courts still have something to say. With respect to such legislation the courts have three functions: to determine whether it is constitutional, to give effect to it if it is constitutional, and to "interpret" it in the process of deciding precisely what effect it is to have in a given case. This last process is often unexpectedly far-

reaching; in fact, few people realize how powerful the law of custom and court precedent is in resisting attempts to change it by legislation. Outstanding cases are the changing interpretation of "combinations in restraint of trade" under the Sherman Anti-trust Act, the putting to sleep of the "long and short haul" clause of the original Interstate Commerce Act, and the commodities clause of the Hepburn Act of 1910, under which railroads were forbidden to carry coal mined by themselves, but continued to do so. When a law whose essential character is to establish theories different from those of the common law, this means interpreting it so as to be in harmony with the common law if the meaning of words can possibly be so stretched as to bring this about (and sometimes when it cannot). Naturally, the effect is frequently to emasculate the law or limit its application to a small part of the field it was expected to cover. These same common-law doctrines are also read into the fifth and fourteenth amendments to the federal Constitution, and thus become the supreme law of the land.

This judicial resistance can often be overcome by repeated efforts of the legislature, restating the law so as to overrule enfeebling interpretations, obviate constitutional objections, and—not least important—prove to the court that the legislation expresses a genuine and vital social need and not a passing whim of professional reformers or a temporary legislative majority. And it may be, on the whole, a healthy thing that movements for far-reaching change in our social and economic structure should be compelled to prove their vitality in this way. On the other hand, if genuine needs are permanently balked or their realization too long delayed, the result may be to allow discontent to accumulate until the pressure becomes dangerous and the belief spreads that our supposed government by the people is an illusion.

It is this friction which was responsible for the Roosevelt proposal for the "recall of judicial decisions" and for

the proposed amendment permitting Congress to repass laws over the Supreme Court's veto, which was sponsored by the Progressive party in the election of 1924. Another proposal is to require more than a bare majority of the court to invalidate an act of Congress on the ground of unconstitutionality. A moderate number of crucial decisions have carried by a vote of five to four, indicating that the law in the case, as law, cannot be clear and unmistakable, since eminent jurists are so evenly divided on it. Moreover in police-power cases—a very important group, as we shall soon see—the law is such as to leave the court free to follow its judgment of the economic and social needs of the situation. In deciding whether to permit an extension of the police power or not, the court is essentially making new law, not interpreting the meaning of the written constitution. Hence the color of reason in the claim that this is a legislative function, on which the court should not have power to overrule the expressed will of the regularly constituted legislative body. These conflicts between different branches of law are among the things with which the layman has little patience.

There are various types of law. Most fundamental for English-speaking peoples is the "common law," by which is meant the general body of case law enforced by English courts of law, as distinct from those of equity, admiralty, etc. It includes old statutes and can be modified or overruled at particular points by new ones. Another important branch of the law is equity, which represents an attempt to do essential justice in cases where the regular legal tribunals and remedies for some reason fail to do so. In particular, it can substitute more effective and sweeping remedies for wrongs, and it can take notice of an expected wrong before it occurs, by the issuance of an injunction. When it was first established, equity was naturally quite free from the precedents of law, but in the course of time it has built up its own precedents, and is hardening itself into them so that a second liberation

may become necessary. Statute law consists of the enactments of the legislative bodies, while the law of written constitutions, in countries which enjoy their benefits, is the supreme law of the land. Be it noted that the law "of constitutions" includes not only the instrument itself, but also that more voluminous constitution which consists of the body of interpretation built up by the courts, and which is in some respects quite independent of its supposed documentary guide. We shall see what this means when we come to discuss the police power.

The law also covers a variety of subjects. Among these are property, contract, inheritance and bequest, personal rights and liberties, injuries (including torts and crimes), bankruptcy, corporations and association, weights and measures, legal tender, and negotiable instruments. Considering the wide variety of relationships represented in this list of subjects, and especially the many ways in which conflicts of interest might arise, it seems fair to conclude that no simple theory of law can be adequate to describe everything it does. Simple theories have been attempted, however, especially the theory of "natural right," which has dominated English jurisprudence for over a hundred years, from the time of Blackstone nearly down to the present.

Blackstone's theory of natural rights was in harmony with the general trend of enlightened thought in his period, which was the end of the eighteenth century. For him there existed a natural moral law, laid down by the Creator of the universe, and it was the business of legal bodies to discover this law, declare it, and enforce it with temporal penalties. Its basis was simple: eternal justice can be attained only by observing the happiness of the individual, while if the voice of justice be obeyed, individual happiness will follow. And as man was endowed at creation with free will and "discernment to know good from evil," his chief natural right is the right of liberty

to pursue his happiness as he will. Political or civil liberty consists of as much of this complete natural liberty as can possibly be preserved in a society, subject to the least possible restraint consistent with the general advantage, natural liberty being diminished only to increase civil liberty.

> These . . . were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because, as there is no known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

In some respects Blackstone's theories seem surprisingly adequate today, while in other respects they appear quite obsolete. In particular, when he speaks of natural rights in the most general terms he is referring to the benefits the individual secures from them, and he is really expressing the fundamental needs of human nature. These do not seem to have changed radically, though we may nowadays define them more broadly, and they are certainly exposed to new perils. But law as a working instrument does not deal with general human needs so much as with specific duties, wrongs, and remedies, and it is here, and especially when it comes to remedies, that Blackstone's views really are essentially obsolete. One serious consequence follows from his identifying natural rights with ethical righteousness; namely, the presumption that any infraction of natural rights must needs be an act which is morally wrong. This carries with it the idea that preventing wrongs is an adequate way to protect rights, and tends to focus the law on a search for blameworthy acts and an imposing of penalties on those

who are found guiltily responsible. In civil cases, the well-nigh universal remedy in Blackstone is an action for damages by the injured party.

What are "rights" in the legal sense? Property and contract are rights, or bundles of rights, but they turn out on examination to be rather complex relationships between a number of parties, involving an assortment of duties, liabilities, powers, and immunities which require a high degree of discrimination to unravel. In particular, jurists distinguish between rights in the strict sense and something else which we may call liberties. The distinction is all the harder to keep clear because our liberties (or some of them) are protected by rights, so that we "have a right to" certain of our liberties. However, if we can gain a clear conception of these two different things, we shall have gone a long way toward understanding the difference between individualism and paternalism as economic systems, for one mark of paternalism is that it makes absolute rights out of things which individualism leaves in the realm of liberty.

Every right implies a two-sided relationship in which one party owes the other a duty and the other party benefits thereby. This relationship, viewed from the standpoint of the beneficiary, is a right in the strict sense. I have rights only so far as other people have duties toward me. (The question whether, to deserve my rights or keep them, I *must fulfil reciprocal duties toward others,* is a separate issue, though of course a vital one.) So far as people have no duties toward me or anyone else, they are free: liberty begins where duty ends, and vice versa. Which means that my rights set the boundaries upon others' liberties.

But to have liberty, one needs something more than mere absence of duty. If others are free to interfere, one's liberty may become well-nigh useless, and hence it must be protected by rights to non-interference on the part of other people. In common speech no distinction is

made between these rights and the liberty which they protect, and such protected liberties are commonly called "rights." In fact, most of the so-called "rights" of an individualistic economy are really protected liberties, and the duties they involve are summed up in the general negative duty of non-interference. When a person speaks of a right to *do* something, as distinct from a right to *receive* something, he is nearly always speaking of a liberty. But not all liberties are protected.

Finally, it is a perfectly commonplace fact that everyone's liberty must be limited in order to keep him from infringing on the similar liberty of other people. This rule may be interpreted in two ways which have very different economic effects. One way is to make the same rules for all and to maintain them even when there is so much inequality between man and man and so much difference between their functions—the things they desire to do and the ways in which they affect each other's interests—that the same rules no longer have any real equality about them. As a French writer has remarked, "The law in the majesty of its equality alike forbids rich and poor to sleep on park benches."

The other way of interpreting this rule is to recognize that our modern specialized society calls upon people to enter into relationships with each other in which the part played by one is essentially different from the part played by the other, the things one can do to injure the other are essentially different from the things the other can do to injure the first, and therefore each must be subject to *different* limitations in order to prevent abuses and produce essential fairness. This calls for substantial reciprocity of obligations, but not for formal equality; and this reciprocity should be judged by the aggregate resultant of the whole scheme, and not by the effect of any one provision or transaction. One-sided legislation in favor of labor *may* be justified on the ground that the employer is already getting more than he pays for or that the

relation is one-sided in other ways. This principle is the one which makes for a progressive system of rights, adapted to the actual needs of industry, and insuring the substance of equal liberty. The other is purely formal, is adapted to a homogeneous society such as has hardly existed since the time of reliable historical records, and tends to leave room for serious encroachments on the reality of liberty under modern industrial conditions. The one promotes "maximum self-assertion"; the other, "social justice."

## LAW AND SOCIAL DEVELOPMENT[6]

All of us, who are concerned with the study, the application and the administration of the law, are from time to time troubled by problems and questions not only as to general principles but also as to the development and the changes constantly going on in the law, and the application of such principles.

The Dean of the Harvard Law School, Professor Roscoe Pound said:

> Law must be stable, and yet it cannot stand still.

The law does not stand still. Law is a rule of conduct established by authority. It is often a legislative act. The conduct of man is influenced by conditions. His actions are in response to given facts. The principles of law as laid down by the courts are authoritative. They are supported by the force of government. Court decisions become the precedents for the future guidance of judges, lawyers and the laity. They are, however, constantly undergoing modification, sometimes by new decisions and sometimes by legislative acts. The legislature steps in and by statute modifies or changes a precedent established by the courts.

[6] From article by Jacob Panken, Lawyer, New York City. *New York University Law Review.* 4:120-5. April, 1927.

Law, being a rule of conduct or of action, necessarily changes to meet new conditions calling for different conduct and different acts. It is as dynamic as life itself. If life were static, unchangeable, if social conditions were permanent and unchanging, it would be possible to establish set rules of conduct and action, a body of law stable and permanent, fitting the conditions.

Professor Frank J. Goodnow, in his work *Social Reformations and the Constitution,* says:

> It must be confessed that Americans are in many respects living under a political system which has been framed on the theory that society is static rather than dynamic, and that the rights which individuals, perhaps properly, possessed in the eighteenth century are the rights that they should properly possess in the beginning of the twentieth century; although present social and economic conditions are quite different from what they once were.

Changing social and economic conditions not only call forth new principles of law, but they give us new concepts as to what is right and as to what is wrong. They even modify our moral concepts. Law must be considered, therefore, from the viewpoint that it is a statement of general principles whose application should take account of changing conditions.

Life has played havoc with those of us who accepted and accept the theory that society is static rather than dynamic. It has stultified us. Since the adoption of the Constitution, in our country, changing social and economic conditions required its amendment nineteen times. The thirteenth amendment was baptized in the blood of a million Americans. It was born in the Civil War.

In the Constitutional Convention, though a proposal for the prohibition of slavery was made and supported by no less a man than Benjamin Franklin, it failed to carry. For almost three-quarters of a century chattel slavery was a lawful institution in our country; it was justified in numerous decisions handed down by erudite judges on constitutional grounds. It was defended by

the United States Supreme Court. It thus was upheld by the federal government.

Changed economic conditions brought social changes, resulting in a greater measure of intelligence, loftier moral concepts which awakened the social conscience of our people to the inherent evil of slavery besides its economic inapplicability in modern society. The facts, as they developed, indicated baldly, as Abraham Lincoln aptly put it, that:

> This nation cannot endure half slave and half free.

The facts changed, and the law was supplied to fit the changed facts.

The fifteenth amendment established the right of citizens to vote. That, however, was the culmination of a long struggle which was carried on in the individual states. The right to vote was not guaranteed under the Constitution; and in most states, after the establishment of the Republic, the right to vote rested upon property qualifications. Citizens were also disabled from voting by reason of color and sex.

It was only in 1920 that all restrictions as to the right of citizens to vote had been removed. That was accomplished by the nineteenth amendment, which reads:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

The enfranchisement of all citizens of the United States had thus been delayed one hundred and forty-one years.

Woman had in these one hundred and forty-one years changed her status. She had, by force of changed conditions, abandoned her domestic occupation, and had been recruited into the service of the developing industries. She had become a bread-winner and a wage-earner. She had become, at least in a measure, independent economically of the male members of her family. She had acquired a stake in government. And thus, she demanded

a voice in the government. She no longer could be gainsaid. The law, accordingly, was again changed to fit the facts.

A study of the nineteen amendments to the Constitution will disclose that each of them was made necessary by the changed facts of life. Lord Bryce says:

> It is hardly an exaggeration to say that the American Constitution as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the convention.

And, as Professor William B. Bizzel, in his work *A Judicial Interpretation of Political Theory,* commenting upon the everchanging law, says:

> In the course of our political history the number of these social judgments have been numerous; the economic, political and social changes of each decade tending to multiply them.

It is desirable that the law be stable. It cannot be made rigid. Rigidity would make its application in the face of changing facts serve a purpose other than that for which it was first intended. The purpose of law is to adjust differences between individuals or between individuals and governments; to right wrongs, to protect the individual against the many, and to protect the many from the individual. Rigidity would serve the opposite end.

The law defines obligations and it conserves rights. Our duties under modern conditions are becoming reciprocal. Our privileges and rights should be common to all. Society, to preserve and improve itself, develops principles that are enacted into law. Sometimes we refer to one phase of the law as sociological. It must breathe with life; it must respond to the breath of life; it must react to the needs of the individual or the society which is made up of individuals.

It is only a short time since we have taken thought about the protection of child life in industry. We only

now realize that the child is the basis of continued social life, that the child is the hope of today and the promise of tomorrow. Child labor laws reflect society's needs. The economic fabric of a nation depends upon healthy and efficient workers. The supply depends upon healthy children. The law is stepping in to protect the child life against its dissipation. Of course the social conscience is a material factor in crystalizing the need of the child protective laws. The organized labor movement, undoubtedly, also exerts a powerful influence in the enactment of child labor laws. That, again, is the result of changing conditions. Labor is interested in child labor laws, first, for the protection of the children of the workers, second, for the maintenance of wage rates and American standards of living. Again life is calling forth laws to meet changing conditions. The facts are that when production was based upon the artisan's skill, the child was no competitor of the adult artisan; but with the introduction of machinery and the division of labor, work was simplified and the child was recruited to compete with the adult; a new condition arose. Society is coming to the aid of the child.

New facts, new laws. It must not be overlooked that economic changes are a determining factor in civilization. As our civilization grows, our social consciousness is awakened. We feel ourselves in duty bound to make the world a better place to live in. We know that it cannot be made a better place to live in unless we equip those who are to live in it with the attributes to make it so. Hence laws for the protection of child life, providing for its education and safe-guarding its health. We no longer leave it to the individual to achieve that; we make it a collective responsibility.

The right of the individual is made subject to the welfare of the collectivity. The individual may not, as he did at an earlier period, use his property unregulated by the collectivity. This principle is still in the process

of development. We have, however, written into the law, because of a housing emergency, a right in society to fix the price for the use of privately owned property, regardless of the contract price entered into between the owner and the renter.

The theory upon which this law has been upheld by the courts of the land is commonly referred to as the exercise of police power. In fact, it rests on the proposition that the control of limited housing facilities in the hands of a few, places these few in a position of exerting coercion, and obtaining by duress, what they in conscience are not entitled to; and, furthermore, on the recognition of the fact that housing is no longer a private matter, that in fact it has become a social function. The latter idea has not yet been clarified. It, however, finds expression in very wide circles of the country.

It cannot be disputed that the basis of the decisions upholding the so-called rent laws is that society cannot permit conduct of any of its members which is unconscionable and as the result of which the majority is compelled to suffer. The law is a mirror of the social and economic conditions. It is the process of adjustment of political and juridical forms of society to the changing social and economic conditions. Take, for instance, the injunction in labor disputes. That is distinctly new in the law. Volumes have been written on this subject. The opinions of the courts pro and con will fill volumes. despite the newness of the law.

The injunction in labor disputes is a child of modern industrial methods. Its use has grown in proportion to the growth and strength of the organized trades union movement. Injunctions in labor disputes are granted *ex parte* upon the application of a plaintiff. It is granted without any notice to the persons or organization enjoined. So that without any opportunity to defend or explain, these persons or organizations are deprived of substantial rights, and it may well be without any justification.

The preliminary writ usually enjoins until the return day of *the Order to Show Cause*. Whatever the outcome may be on the argument of *the Order to Show Cause*, until the return day the defendants are enjoined, and the purpose of the injunction is served.

Mr. Morris Hillquit in a lecture before the Bar Association on November 11, 1926, said:

> What the courts rarely realize but employers generally do, is that a preliminary injunction is, in practice, apt to operate as a final adjudication of the controversy. When the injunction is finally vacated the damage has been done.

The courts have held, particularly in the State of New York, that workmen have a right to organize for the protection of their interests, that they have a right to strike for any reason sufficient to them, that they have the right to peaceful picketing, and that they even have the right to boycott. It may be well to point out that these rights have been recognized by the law despite the common law limitations and restrictions placed upon the workers. Under the common law the organization of workers to protect their interests through withholding their work was held to be conspiracy.

It was the changing conditions and facts that changed the law. The use of the injunction in labor disputes was evolved to neutralize the efficacy of the trades union and the strike. Again, changing conditions gave rise to a new law. I venture to prophesy that the various states and the federal government will enact legislation to nullify the injunction law as it developed by the decision of the courts.

The courts are temples of justice. It is to them that we turn to right wrongs.

Judge Cardozo, in *The Growth of the Law*, says:

> Justice itself, which we are wont to appeal to as a test, as well as an ideal, may mean different things to different minds and at different times.

Law must fit the facts. Sometimes they reflect the facts, as marshalled by one group or another in society,

and not as they are. Such laws fail. They become obsolete or are repealed.

Woodrow Wilson said in *The New Freedom*:

> If your laws do not fit the facts, the facts are not injured, the law is damaged; because the law, unless I have studied it amiss, is the expression of the facts in legal relationships. Laws have never altered the facts; laws have always necessarily expressed the facts, adjusted interests as they have arisen and have changed toward one another.

## LAW AND ORDER[7]

Truth is permanent and persistent. Sound principle does not admit of variableness or shadow of turning. Clear vision and full appreciation of fundamental and elementary things may, in this generation or in that, in this or any other period of history, be obscurred, perverted or utterly blinded, but the truth and the principles themselves remain unchanged, unchanging, eternal and everlastingly operative. In the clamor and din of warring classes or factions, in the dust and smoke raised by battling forces, in the confusion of intermingled and swiftly swaying bodies of men and banners of contending hosts, we frequently lose our way, remove our gaze from the guiding light, and utterly forget or become indifferent to the truth until some cataclysmic shock suddenly restores our vision and swings us back to the way, the truth and the light, as they were pointed out to us by the greatest teacher of all time, two thousand years ago. Times have changed, customs and habits of thought have changed, circumstances have changed, but they, the way, the truth and the light, have never changed, and never can change, although we, by forgetting and neglecting them, stumble and fall and cause calamity to ourselves and others by our indifference and forgetfulness.

[7] From article Law and Order in Industrial Disputes, by Charles Thaddeus Terry, Professor of Law, Columbia University, New York. *American Bar Association. Journal.* 9:115:23. February, 1923.

The foundation stone of society, the cardinal principle of democratic government, the last best hope of humanity, was given to the world in time so ancient, that we have had ample time to learn it well, by a disciple who, catching it from the lips of the master teacher, summed it all up in the phrase—"the perfect law of liberty."

The juxtaposition of the words "law" and "liberty" denotes their inseparability in any government which is to be characterized by permanence.

The lesson has never been learned, or it has too frequently been forgotten. Liberty without law means mob rule. Law without liberty is tyranny. Each contains within itself the seeds of destruction.

The evils which beset the body politic and frequently seem to cause it to rock upon its foundation arise because large bodies of citizens forget or ignore the truth and offend against the light. Labor forgets or ignores it and plunges into mob rule. Capital forgets or ignores it, and establishes a tyranny. They both forget it and ignore it at the same time and wreck the health and happiness of a long-suffering public.

Justice is the subject of law and the promotion of justice is the reason for law and its only justification.

Selfishness is the false guide which has led industry, like an *ignis fatuus* into the swamps and morasses of doubt and despair, and has left its victims wallowing in the Slough of Despond, lost and with darkness coming on. Ignorant and perverted leaders of both capital and labor, obsessed by the idea that selfish interest is the test of success, have marched their followers off the highway of peace and prosperity into the entanglements and impenetrable shadows of the forest of stupidity. The one simple truth which they have forgotten is, that no group or class can be permanently safe, prosperous and happy unless the whole body, of which they are a part, is safe, prosperous and happy. Temporary advantage may be gained by shrewd selfishness, backed for force, but it is

only temporary. Time after time this lesson has been taught with accompanying grief and distress, and still the lesson is only partly learned.

One thing is certain,—there is no place in our system for any individual or group of individuals who do not want justice, but who want to gain an unfair or unjust advantage. The system will not tolerate the substitution of the arbitrament of force for the arbitrament of law. To the extent to which that substitution is made, there will be calamity; and if the substitution is made over the whole field of American life, then our government and institutions will crumble and fall, our democracy pass into oblivion and its citizens, conquerors and conquered alike, go down to destruction together. Even the successful tyrant does not endure.

Until the millenium shall have come, and the brotherhood of man has been brought to perfection, there will be need of laws and of courts, and they will be found the only safeguard of liberty and of justice.

We deem these things fundamental; we consider them the plainest dictates of common sense; we think them so far past arguments as to be indisputable. And yet there are those who cannot or will not understand the spirit of our institutions and the great success of their achievements. They flout and seek to circumvent the courts and the laws. Although they understand or should understand that their very happiness, prosperity and well-being and preservation depend upon the democratic principle of rule by the will of the majority, they seek to accomplish the destructive purpose of government by minorities, against the dreadful lesson of all history.

There are two great forces fighting against each other in America, just as there have always been everywhere in the history of the world; the force of a narrow self-interest and the force of the Brotherhood of Man. They are the forces which are contending in the industrial world today as never before. Neither side has yet seen

the perfectly clear truth that even the self-interest of each of the contending parties is bound up in the principle which is supposed to be antagonistic, but is not,—I mean the principle of the Brotherhood of Man.

Like web and woof all destinies are woven fast,
All linked together like the keys of an organ vast.
Tear one thread and the web ye mar.
Break but one of a thousand keys and the paining jar through all shall run.

So far, it has been the law of the jungle against the law of humanity and the law of God, and until the light is seen and the identity of the interests of both contending parties is appreciated, and it is understood that no individual or group of individuals secures its greatest happiness and well-being except through the happiness and well-being of the whole body, there must, of course, be interposed between the disputants, the restraining and regulatory arm of the law.

It is important and appropriate that America should set the standard. Because if America fails to make good, the whole world goes down in chaos. No longer is Washington simply the capital of the nation—it is the capital of the world, and here must be set in motion the forces which shall encircle the world in a bond of peace and mutual good fellowship.

In the far East, twenty centuries ago, arose the star which lighted the world with its message of peace and good will toward men.

It is to the West, yea, even to this western hemisphere of America, that the world now looks for the consummation of this idea and the magnifying of the light of that star; and here must the prophesy be realized.

Men look to the East for the rising things, for the light of a dawning sun,
But they look to the West, the Crimson West, for the things that are done.
For out of the East they have always come, the cradles that saw the birth

Of all the heart-warm hopes of men, of all the hopes of earth.
There in the East arose the Christ, and there in the East they dreamed.
The truest dream, the bravest dream that prophet has ever dreamed.
And into the waiting West they came with the dream-child of the East,
To find the hopes they hoped of old a hundred-fold increased.
For there in the East they dreamed the dreams, of the things they hoped to do,
But here in the West, the Crimson West, the dreams of the East come true.

## SUPREMACY OF THE LAW[8]

Since the days of Sodom and Gomorrah, lawlessness and disrespect for constituted authority have made periodic, if not continuous, manifestation among men. No nation, no people, no form of government has escaped these evils.

The march of human progress has been interrupted, impeded and at times stopped in its tracks by ebullitions of lawlessness.

Liberty has been the inspiring theme of matchless eloquence since mankind first began to strive for freedom from oppression. In poetry and song, and in sculptured bronze, Liberty has been personified as holding aloft a lighted torch to banish the darkness of an ignorant and superstitious world and give enlightenment to mankind. But liberty in its highest ideal embodies all there is of worth in the shibboleth of universal brotherhood. In its essence, liberty amongst men implies love for humanity—that spirit of the individual which accords to others the same rights he cherishes for self. It contains the germ of the Golden Rule.

But such an ideal liberty is beyond the pale of utopian dreams of civil government. Liberty amongst men in

[8] From address by Charles M. McCabe, President, Indiana State Bar Association. *Indiana State Bar Association. Proceedings,* 1922:41-2.

organized society can only exist under the restraints of law. With no legal restraint, liberty rises no higher than animal instincts of brute, force of tooth and claw, of fang and talon.

In this gross sense it is a contradiction and denial of law, a refutation of all nature.

Ruskin said:

> If there be one principle more widely confessed by every utterance or more sternly than another imprinted on every atom of the visible creation, that principle is not Liberty, but Law.

The Saviour proclaimed to his followers: "And ye shall know the truth and the truth shall make you free."

That truth was, and is, the law of righteousness, of restraint, of obedience to authority. It was this *truth,* this *law,* that Pilate knew not of, and in his ignorance asked the question, "What is truth?" and stayed not for answer.

Truth in human relationship is the synonym of liberty restrained by law. The resultant of both make men free. It is this freedom, this kind of liberty that the Pilgrim fathers sought when they forsook their home and country, crossed the trackless deep in frail and sluggish craft, and with stern heroism subjugated the wilderness and established the foundations of a world democracy.

It was this liberty that Montesquieu conceived and defined when he said:

> Liberty consists in the ability to do what one *ought to desire,* and in not being forced to do what one *ought not to desire.*

We might with Ruskin compare liberty to a majestic river. When confined within its banks it pursues its natural and tranquil course, ministering to the happiness and prosperity of man. Bursting these restraints it spreads desolation and destruction in its wake.

The supremacy of the law is the very heart of our institutions. What rules of conduct and what reciprocal rights and duties, defined and determined in the first instance by the legislative branch of the government are

ultimately determinable only by the courts in which all judicial power is vested, and of these our Federal Court, within its proper province, is, under our fundamental law, the supreme power of our whole scheme of government. The people themselves, by their chosen representatives, make, alter and amend the law. They have no law which they do not make. Officers of their choice administer it. Judges chosen under the law construe and by judicial writ enforce it. These laws, these officers and these courts are ordained and established by the voluntary action of the people themselves. When, therefore, the law is overridden, defied, violated or trampled under foot by any man or group or class of men, the wrong, the crime, the violence is against the people themselves, against the sacred rights which their time-honored institutions were created by their compact to protect.

# LAWLESSNESS

## OUR INGROWING HABIT OF LAWLESSNESS[1]

*That bids him make the Law he flouts,*
*That bids him flout the Law he makes.*

For a dozen years the leaders of the legal profession, social workers and laymen on the streets have looked with justified alarm on the spectacle of single American cities indulging in more crime a year than all the people of Great Britain—the menace of acknowledged and chronic lawlessness. Crime commissions sit, and clean-up campaigns come and go. But every great American city remains a dangerous place by day and by night. Murders, hold-ups, homicides: in gambling districts, in silk-stocking areas, on the grounds of great universities, in the shadow of cathedrals. What is the cause? Is there no remedy?

It is a later stage of a great historical process. And history ought to be our teacher. Our earliest ancestors fled from a world of restraint and subordination. They found themselves in the midst of a vast wilderness where lands were to be had for the taking, and where social restraint slowly relaxed. To avoid wars with the red men, the English government forbade the private seizure of home sites. The colonists ignored the law. Then assemblies of the early commonwealths repeated the injunctions of the mother country. For a hundred and fifty years these injunctions were violated in every settlement. The consequence was a lawless frontier that stretched in 1776 all the way from New Hampshire to

[1] From article by William E. Dodd, Professor of American History, University of Chicago. *Century.* 116: 691-8. October, 1928.

northern Georgia, the great Indian tribes beyond the Alleghanies, bitter and unrelenting foes. Benjamin Franklin, George Washington and Richard Henderson, foremost of American heroes and pioneers, violated or approved the most solemn of decrees against the seizure of Indian lands. It was a great example, a long conflict which merged into the war for independence.

Of hardly less importance in the making of the American mind was the effect of British limitations set upon ocean trade. From the day when tobacco became a valuable commodity, the Southerners craved access to the rich and active Dutch market. England forbade it and set up a hundred rules to outlaw it: a thousand ship-masters and hopeful tobacco-planters violated the law, first and last, and set up the doctrine of free trade for all the world. What the easy-going Virginians did in a quiet way, the stern saints of Massachusetts did with Cromwellian ruthlessness. They sailed the fastest ships upon the ocean. They took their products to the forbidden West Indies. They disposed of their cargoes for the shining gold and silver of the Spanish world, or loaded into their ships' holds the precious Jamaica rum, hurried to the coast of Africa and brought back bewildered blacks for the growing plantations, and then took sugar to New England where they converted it into more rum which found its way to the frontier farms and the Indian villages, in return for skins and furs. In the hundred years before 1776 they built up one of the great trades of the world and kept the British navy on guard day and night trying to bring the clever lawbreakers to book, trying in vain. And this violation of known and acknowledged law likewise merged into the Revolution of 1776, "free trade all over the world" one of its chief slogans. Other great Americans made their names in this prolonged conflict, Sam Adams, James Otis and John Hancock, names as dear to New-Englanders as those of Franklin and Washington farther south: an

abiding influence on the minds of the men who must later become the citizens of the great, free republic.

Free lands and free trade. When the War of Independence was over, the very men who had taken lands for themselves or made fortunes in unlawful trade must lead or govern other men who had accustomed themselves to violate unpopular laws. It was not an easy position. And the war had cost so much that the leaders of 1787 set aside the rich unseized lands for the payment of domestic and international debts. Nor was there any other way to procure an income but by the laying of heavy taxes upon trade. There was, therefore, neither free lands nor free trade; and now the Indians were guaranteed their hunting-grounds even more firmly by Washington than they had been guaranteed by George III. Frontiersmen everywhere violated the new land laws as they had violated the older ones; the habit was chronic on the western borders.

Nor was it different with the trade on the Atlantic, save only as the British navy intervened. But a little later when the French made all Europe and every sea a scene of war, American tradespeople came again into their own. And for twenty years fortunes piled up in eastern towns—an example of abiding influence in the region of steady habits. One needs not to press the point, nor discuss circumstance and justification. The Westerners had their lands for which they did not pay. The Easterners carried their flag, when they did not raise the flags of other nations, into every sea. It was young, ruthless America, flouting the law he made.

But the fathers, like their descendants, dreamed dreams. In 1787 they agreed in congress not to allow the dangerous and unsocial institution of slavery to be planted in the virgin region then called the Northwest. In the sixth clause of the ordinance of 1787 all settlers entering the rich area were forbidden to take black slaves with them. But negroes were marvelous men with the

ax. Virginians and Kentuckians knew a higher law. They paid little heed to the rules of mere idealists who thought to make men perfect in a wicked world. When Jefferson found ways to negotiate vast tracts of lands from the natives, he was hailed a great philosopher and statesman; when he laid idealistic reforms upon the Northwest and sought to make black men free, he was a wild dreamer. And so negroes were carried into Ohio, sometimes as slaves, sometimes as indentured servants; nor were the courts disposed to intervene and enforce the law. Courts are timid in great matters. There were many slaves in Indiana forty years after 1787; and in Illinois there was a great struggle as late as 1823 to determine whether that state might become a slave state like Virginia, the sacred ordinance hardly mentioned. Freemen in a free country did not take easily to the ways of law and order. But I must not say the reform of 1787 was wholly without effect. Assisted by climate and the character of the soil the successors of the reformers won their point and made Illinois a free state on a close margin, their victory one of the remote causes of the war between the states.

There was to be another trial of a great law. Thomas Jefferson sought in the anti-slave-trade law of 1807 to forbid forever the importation of blacks from Africa. He reorganized the House of Representatives in December 1806 in the hope of realizing his dream, three fourths of the people clearly with him. After a bitter debate, his proposition was made into law, though the proposed penalties were converted into jokers. Every year after 1807 there were more slaves imported from Africa than the average in the years before. In 1820 the law was made as severe as death itself, not to mention the confiscation of ships caught in its violation; and Great Britain, with war-ships upon every sea, was engaged later by treaty to assist in the enforcement of the law.

But powerful men in the minority opposed the law. They violated it in its severer, quite as freely as in its

milder form. In a little while cotton became so important that thousands of anti-slavery men moved south to make cotton, buy slaves and flout the law. From fifty to a hundred ships participated in the forbidden trade and put their profits in the banks of New York and New England. The attorneys-general of the United States were themselves slaveholders; and their appointees in the slave states resigned rather than apply the law in their sections. Eight to ten thousand blacks were bootlegged into the South every year and never a man was hanged till Abraham Lincoln hardened his heart in 1862 and a poor devil paid the penalty in New York. The interests of individuals and the rights of states to violate federal law were stronger than the will of the majority.

In the anger and rivalry of 1850 both Northerners and Southerners agreed to the enactment of the famous fugitive-slave law. The bill did not fail of safe majorities. The law was but a plan for the enforcement of a clause of the constitution. Clay and Webster, Douglas and Lincoln declared the law valid and properly enforceable in all the states. But a minority, not unaware that the Southern planters flouted the anti-slave-trade law, a small minority in the centers of publicity, refused all obedience to restrictions dealing with the recovery of slaves; and local representatives of the United States were helpless and without power in the endeavor to enforce law. Then Northern states like Southern states claimed the right to violate national law. For ten years there was "a higher law" of human welfare which took precedence over actual law. A long period of violation of plain federal statutes in the South was countered by plain violation of equally plain federal statutes in the North. The result was war, one of the most devastating and needless wars in history—a consequence of long habits of lawlessness, contempt of the expressed will of the majority.

And war, as usual, solved few if any of the problems it was expected to solve. When, at last, the South was

at the end of its tether, its representatives could not be brought back into the Union they had hastened out of, without raising every problem that had been fought over in the field. The victors, in a minority even in their section of the country, now undertook to bring the Southerners back only upon terms of a social revolution as drastic as that of Russia in our own time. But the plan could not be made effective without a constitutional amendment; and an amendment to be valid must have Southern states' votes, which could not be had except on positive coercion. Clever men managed so that the necessary amendments appeared to have Southern support and the greatest of all American reforms was adopted. Slavery was abolished and freedmen given the right to vote. But the South refused to obey, and with constitutional right on its side. The fourteenth and the fifteenth amendments were never constitutionally adopted.

Resistance became all but unanimous. The freedmen suffered. They were intimidated, frightened, killed in many a conflict or election brawl. Twenty years after the close of the war the South was still united in its violation of the terms of the Constitution. The interests of weak and poverty-stricken men as well as the ancient rights of states to govern themselves were appealed to. Passive resistance proved more successful than war. In the long process another generation of Southerners accustomed themselves to daily violation of law, the Federal courts keeping hands off. Nor were the people of the Northern states uninfluenced by the general breakdown of coercive methods in the South.

There Jay Gould, "Commodore" Vanderbilt and Daniel Drew outdid each other in relieving stockholders of their railroad holdings, defying in the process both the wills of states and the power of the United States. A judge of a high court validated the predatory proceedings of one set of "financiers," while another judge validated the robberies of another set. If railroad

speculators might violate laws they did not like, political organizations such as Tammany Hall and the Albany Gang might do as much. And what happened in New York happened in the oil region of Pennsylvania, the copper country of the Northwest and in turbulent California. Human life was everywhere held cheap: rate wars, train robberies, cattle stealing and plain murder. The United States saved from black slavery had fallen into a plight that was not much better. Both the Constitution and the laws were the playthings of those who had the power to flout them.

As men emerged into the twilight of the late eighties, they saw business concerns about to capture the country and set up a system quite as undemocratic as that of the planters of 1860. The remedy seemed to be the law, so often flouted. In 1893 the Sherman Anti-Trust Law was enacted by overwhelming majorities with penalties drastic enough. It was a common saying that little fish could not live in waters where shark abound. The railroad and other corporations would destroy smaller and scattered corporations and individuals who happened to get in the way. The motive behind the law was the same that lay behind the great anti-slavery movement. But in this case as in the other, powerful men refused to obey the law; and the measure was not enforced. The first attorney-general who was supposed to apply the law was himself a recent counselor of the corporations he must dissolve. In the East as in the South half a century before, men had laughed at the law of their country; and now none of the Presidents from Cleveland to Taft set himself the heroic task of enforcement. In 1894 there was a strike of the Pullman Car Company's workers in Chicago. Organized labor supported the strike. The economic life of the country was about to be halted; and the very men, who had no thought of obeying the law themselves called upon the President to apply the anti-trust law to organized labor as a menace to free trade

and open competition! President Cleveland was reduced to the necessity of perverting the Sherman law in order to conserve the peace of the country. His attorney-general prosecuted organized workers as men who were conspiring to restrain trade and interfere with free competition! If Southerners might ignore clauses of the constitution and business men might flout laws they did not like, why might not working people, just beginning to feel their powers, do as they chose? The effects of a long history of lawlessness began to show, to show in the midst of cities where men cannot afford to be too free.

The long-drawn history of poor Europeans scattered over a wide expanse of wild American country had left its abiding impress upon the minds of those who in 1900 were merging into a great people. Law was not sacred. The strongest had generally found a way to violate it or turn it to individual or class advantage. And it was a time of changing concepts. The automobile, the wireless, the flying-machine and the radio were in the offing. Men who had all their lives thought a home and friendly acres the *summum bonum* of earthly existence were abandoning the homesteads of their fathers by the hundreds of thousands for shacks and meager cottages in the slums of great towns and cities. In the country it was every man's right to bear arms, a constitutional right; and the rapid growth of the manufacture of firearms put a gun into the hands of men and boys at the price of a day's labor. At Christmas time and on holiday occasions five-year-olds drew little guns and imagined themselves shooting others at the drop of the hat. And there were ten cent editions of pamphlets and novels whose heroes were the desperadoes: John A. Murrell, Jesse James and their kind. When people accustomed to such examples moved in masses to the city, there was every reason to expect disorder.

Nor were the cities of 1900 models for country folk. For half a century, mayors and aldermen, party bosses and policemen had regarded the people of cities as legitimate prey. One needs hardly to mention the exploits of the gangs in Philadelphia and Chicago, the hold-up men or the red light districts in other towns to suggest to the reader what was apt to be the future of great cities. The United States was preparing schools of crime for her young. Nor was the habit of whisky drinking, so common everywhere, likely to lessen the risks of the new day. Before the Civil War a man could get drunk for ten cents; the high revenue laws that followed the war raised the price of a gallon of whisky from fifty cents to two or three dollars. Everywhere distillers evaded the law. Then they set up their little plants in the woods, along the lonely rivers or on the slopes of high mountains, and escaped the payment of the revenue tax, selling "moonshine" whisky in great quantities at low prices. In the cities there was a bar-room on every convenient corner and houses of doubtful fame near by and open at all times. If the country of 1900 was individualistic and not a little disposed to crime, the city was hardly better. Any man who wished carried a pistol. And in both city and country the habit of ignoring or violating law was closely associated with local politics. Country and village politicians and office-holders winked at moonshine makers; city bosses and ward heelers held their party caucuses in the back rooms of bar-rooms and planned the defeat of opponents or the murder of public men who could not be bribed.

All these facts and the influences which lay behind them were known and lamented. The shouting revivals of old-time Methodists and Baptists were aimed at correcting them. Dr. Charles G. Finney warned drunkards against bottomless and burning pits that yawned to receive them. Dwight L. Moody prayed and wept over

the lost sinners of Chicago for twenty years. The sorrowful pictures of *Ten Nights in a Bar-room* were shown in cheap theaters; and the incomparable Joe Jefferson revealed the hopeless case of *Rip Van Winkle* everywhere, one of the finest pieces of propaganda ever staged. But these deterrent influences proved poor competitors of the bar-rooms and the red lights; so about the turn of the century the Anti-Saloon League of America was organized in Ohio.

Already the sons of New England in Kansas and neighboring states were trying the efficacy of prohibition laws. In the South a generation that had almost forgotten the lure of polite drinking was ready to adopt prohibitive measures in the black counties, in the hope of restraining negro rowdyism and crime. There was some progress, it seemed. Most of the churches lent enthusiastic aid. The Woman's Christian Temperance Union took on new life. And great business concerns came gradually to see that sober working-men meant fewer accidents and more efficient production. Organized labor was tempted to lend support. An engineer with a bottle in his pocket was forbidden to drive a locomotive. In a little while it began to appear dangerous for a drunken man to drive a Ford upon the public highway, and Fords were taking to the highways by the million. Josephus Daniels, Secretary of the Navy, ruled that, if a private seaman might not drink, an officer must keep sober. Sentiment, economics and safety were combining to assist the solemn moralists who wished to destroy the liquor traffic in order to save men's souls. It was a powerful combination.

In 1919 the eighteenth amendment to the federal Constitution was adopted by all the states except Connecticut and Rhode Island; and the Volstead act soon followed. There was some slight question that the prohibition reform had been legally adopted, but the Supreme Court declared on June 7, 1920 that the eighteenth amendment

and the Volstead act were constitutional. In 1923 and again in 1924 the same court reasserted the lawfulness of the prohibition statute. There was to be a long drought. And with the drought there were distinct improvements in the reports of crime. Working-men were more steady at their jobs; negro tenants and day laborers could be found on Monday mornings; there was a steady decrease in the number of lynchings. It was another of the great reform efforts like that of the Sherman Anti-Trust act and the Jefferson anti-slave-trade law. Would the law prove effective?

Men who had liked their drinks all their lives laid in supplies; cellars were enlarged and the demand for bottles and kegs was steady. Every man is a lord in his own house. The most ardent drys for the common good served Scotch whisky and wines on their tables: Prohibition was for the good of the working people. Then bar-room keepers slipped supplies to less fortunate patrons who had no cellars, and obedience to the law began to fail. Physicians prescribed a pint or a quart to deserving patients: everybody had a physician and most patients would pay back bills if liquor could be had. Enforcement of the law in such a case was difficult. Then drug-stores took on an unwonted prosperity, handsome cars at their doors early and late. The ancient American habit of flouting the law one makes became effective. A well-to-do citizen rather liked the publicity of moving his liquors when he took a new flat, officers of the law a little afraid to pry into rattling cases. Men spoke of their bootleggers as they had formerly mentioned butlers and coachmen. Family cellars seemed inexhaustible; soft drink counters and organized dispensers of the best of liquors gradually broke down the feeling of the better classes that law ought to be observed. To get drunk or to bear a red nose was the sign of independence, freedom, gentility. The cult of resistance to law grew as it had grown in the slave-holding South a century before.

Mere reformers were not to prescribe the habits of powerful folk; and if powerful folk ignored the law it was certain the smaller people would imitate them. Preachers lagged a little in their enthusiasm; deacons and elders acquired cellars. University presidents whose predecessors had pressed legislatures to make wide dry zones about their grounds, now declared that it was merely impolite for a student to be caught drunk on the campus. It was but a short step from this to the general approval by the newspapers of violation of the Volstead law, "the work of fanatics." And the daily news column was soon made to do valiant service.

Into the cities before prohibition became a rule of law, there had been pouring hundreds of thousands of immigrants from the four corners of Europe. Immigrants from Europe have usually been law-abiding; they have come out of social systems which compelled obedience. But they had never been forbidden to drink; and drink had been a means of forgetting ills that could not be cured. What they saw in their new homes did not tend to restrain them. The land of freedom was a marvel. Since they lived apart and knew not a word of English, they tended to unite in gangs and to follow gang leaders as earlier immigrants had done. The way to lawlessness was made easier; and the rewards of lawlessness were many and real. As they came finally to read the great dailies, they understood that Americans disobeyed the law if they disliked it. From 1900 to 1928 the large towns and cities of the United States, with their increasing population of natives and their floods of foreigners, were vast schools of crime—resistance to the prohibition laws one of the primary motives of the epoch. The last of the great reform laws was like its predecessors—an invitation to the clever, to him who had a political pull, even to the workman in his shop, to flaunt the law of his country. Few seemed to think of possible consequences.

Judge Marcus Kavanagh's recent work, *The Criminal and His Allies* offers the astounding and apparently correct statement that mortality from homicides in the United States increased from 2.1 per hundred thousand in 1900, to 8.5 per hundred thousand in 1924. In 1926 the author estimates upon the best of statistical authority that the ratio is 11 per hundred thousand. In England there were only .8 homicides per hundred thousand in 1920 and .6 in 1923. These are figures that might well set men to thinking. Is it wise for great men and great newspapers to violate law?

The growth in crime has increased to the point that life in large cities has become somewhat precarious. The newspapers attribute it to the efforts of prohibition agents to enforce the law. Judges attribute it to the incoming foreigners. Business men say it is the breakdown of the judicial system. Perhaps all of these contentions bear an element of truth; and perhaps there are other and important unnamed causes. But there has been a habit of lawlessness in the United States from the earliest days, a habit which has influenced immigrants on their arrival, which has warped the minds of the young, which has swayed the officers of the law, and which gravely threatens the existing social order.

## SPIRIT OF LAWLESSNESS[2]

It is my purpose to inquire into the causes of a revolt against authority, of which no careful observer of present tendencies can be ignorant.

One of the most quoted—and also misquoted—Proverbs of the wise Solomon says, as translated in the authorized version: "Where there is no vision, the people perish." What Solomon actually said was: "Where there is no vision, the people cast off restraint." The translator

[2] From address by James M. Beck, Solicitor General of the United States, before the American Bar Association. *American Bar Association. Report,* 1921; 168-77.

thus confused an effect with a cause. What was the vision to which the Wise Man referred? The rest of the Proverb, which is rarely quoted, explains:

> Where there is no vision, the people cast off restraint; *but he that keepeth the law, happy is he.*

The vision, then, is the authority of law, and Solomon's warning is that to which the great and noble founder of Pennsylvania many centuries later gave utterance, when he said:

> That government is free to the people under it, where the laws rule and the people are a party to those laws; and all the rest is tyranny, oligarchy and confusion.

It is my purpose to discuss the moral psychology of the present revolt against the spirit of authority. Too little consideration has been paid by our profession to questions of moral psychology. These have been left to metaphysicians and ecclesiastics, and yet—to paraphrase the saying of the Master—"the laws were made for man and not man for the laws," and if the science of the law ignores the study of human nature and attempts to conform man to the laws, rather than the laws to man, then its development is a very partial and imperfect one.

Let me first be sure of my premises. Is there in this day and generation a spirit of lawlessness greater or different than that that has always characterized human society? Such spirit has always existed, and even when the penalty of death was visited upon nearly all offenses against life and property. Blackstone tells us (Book IV, Chap. 1) that in the Eighteenth Century it was a capital offense to cut down a cherry tree in an orchard—a penalty which should increase our admiration for George Washington's courage and veracity.

We are apt to see the past in a golden haze, which obscures our vision. Thus, we think of William Penn's "holy experiment" on the banks of the Delaware as the realization of Sir Thomas More's dream of utopia; and yet Pennsylvania was called in 1698 "the greatest refuge

for pirates and rogues in America," and Penn himself wrote, about that time, that he had heard of no place which was "more overrun with wickedness" than his City of Brotherly Love, where things were so "openly committed in defiance of law and virtue—facts so foul that I am forbid by common modesty to relate them."

Conceding that lawlessness is not a novel phenomenon, has not the present age been characterized by an exceptional revolt against the authority of law? The statistics of our criminal courts show in recent years an unprecedented growth in crimes. Thus, in the federal courts, pending criminal indictments have increased from 9503 in the year 1912 to over 70,000 in the year 1921. While this abnormal increase is, in part, due to sumptuary legislation—for approximately 30,000 cases now pending arise under the prohibition statutes—yet, eliminating these, there yet remains an increase in nine years of over 400 per cent in the comparatively narrow sphere of the federal criminal jurisdiction. I have been unable to get the data from the state courts; but the growth of crimes can be measured by a few illustrative statistics. Thus, the the losses from burglaries which have been repaid by casualty companies have grown in amount from $886,000 in 1914 to over $10,000,000 in 1920; and, in a like period, embezzlements have increased fivefold. It is notorious that the thefts from the mails and express companies and other carriers have grown to enormous proportions. The holdup of carriers have grown to enormous proportions. The holdup of railroad trains is now of frequent occurrence, and is not confined to the unsettled sections of the country. Not only in the United States, but even in Europe, such crimes of violence are of increasing frequency, and a recent dispatch from Berne, under date of August 7, stated that the famous International Expresses of Europe were now run under a military guard.

The streets of our cities, once reasonably secure from crimes of violence, have now become the field of opera-

tions for the footpad and highwayman. The days of Dick Turpin and Jack Shepherd have returned, with this serious difference—that the Turpins are not dependent upon the horse, but have the powerful automobile to facilitate their crimes and make sure their escape.

In Chicago alone, five thousand automobiles were stolen in a single year. Once murder was an infrequent and abnormal crime. Today in our large cities it is of almost daily occurrence. In New York, in 1917, there were 236 murders and only 67 convictions; in 1918, 221, and 77 convictions. In Chicago, in 1919, there were 336, and 44 convictions.

When the crime wave was at its height a few years ago, the police authorities in more than one city confessed their impotence to impose effective restraints. Life and property had seemingly become almost as insecure as during the Middle Ages.

As to the subtler and more insidious crimes against the political state, it is enough to say that graft has become a science in city, state and nation. Losses by such misapplication of public funds—piled Pelion on Ossa—no longer run in the millions but the hundreds of millions. Our city governments are, in many instances, foul cancers on the body politic; and for us to boast of having solved the problem of self-government is as fatuous as for a strong man to exult in his health when his body is covered with running sores. It has been estimated that the annual profits from violations of the prohibition laws have reached $300,000,000. Men who thus violate these laws for sordid gain are not likely to obey other laws, and the respect for law among all classes steadily diminishes as our people become familiar with, and tolerant to, wholesale criminality. Whether the moral and economic results overbalance this rising wave of crime, time will tell.

*In limine,* let us note the significant fact that this spirit of revolt against authority is not confined to the political state, and therefore its causes lie beyond that sphere of human action.

Human life is governed by all manner of man-made laws—laws of art, of social intercourse, of literature, music, business—all evolved by custom and imposed by the collective will of society. Here we find the same revolt against tradition and authority.

In music, its fundamental canons have been thrown aside and discord has been substituted for harmony as its ideal. Its culmination—jazz—is a musical crime.

In the plastic arts, all the laws of form and the criteria of beauty have been swept aside by the futurists, cubits, vorticists, tactilists, and other æsthetic Bolsheviki.

In poetry, where beauty of rhythm, melody of sound and nobility of thought were once regarded as the true tests, we now have the exaltation of the grotesque and brutal; and hundreds of poets are feebly echoing the "barbaric yawp" of Walt Whitman, without the redeeming merit of his occasional sublimity of thought.

In commerce, the revolt is one against the purity of standards and the integrity of business morals. Who can question that this is pre-eminently the age of the sham and the counterfeit? Science is prostituted to deceive the public by cloaking the increasing deterioration in quality. The blatant medium of advertising has become so mendacious as to defeat its own purpose.

In the recent deflation in commodity values, there was widespread "welching" among business men who had theretofore been classed as reputable. Of course, I recognize that a far greater number kept their contracts, even when it brought them to the verge of ruin. But when in the history of American business was there such a volume of broken faith as a year ago?

In the greater sphere of social life, we find the same revolt against the institutions which have the sanction of the past. Laws which mark the decent restraints of print, speech and dress have in recent decades been increasingly disregarded. The very foundations of the great and primitive institutions of mankind—like the family, the church, and the state—have been shaken. Nature itself

is defied. Thus, the fundamental difference of sex is disregarded by social and political movements which ignore the permanent differentiation of social function ordained by God himself.

All these are but illustrations of the general revolt against the authority of the past—a revolt that can be measured by the change in the fundamental presumption of men with respect to the value of human experience. In all former ages, all that was in the past was presumptively true, and the burden was upon him who sought to change it. Today, the human mind apparently regards the lessons of the past as presumptively false—and the burden is upon him who seeks to invoke them.

Lest I be accused of undue pessimism, let me cite as a witness one who, of all men, is probably best equipped to express an opinion upon the moral state of the world. I refer to the venerable head of that religious organization which, with its trained representatives in every part of the world, is probably better informed as to its spiritual state than any other organization.

Speaking last Christmas Eve, in an address to the College of Cardinals, the venerable Pontiff gave expression to an estimate of present conditions which should have attracted far greater attention than it apparently did.

The Pope said that five plagues were now afflicting humanity. The first was the unprecedented challenge to authority. The second, an equally unprecedented hatred between man and man. The third was the abnormal aversion to work. The fourth, the excessive thirst for pleasure as the great aim of life. And the fifth, a gross materialism which denied the reality of the spiritual in human life.

The accuracy of this indictment will commend itself to men, who like myself are not of Pope Benedict's communion. I trust that I have already shown that the challenge to authority is universal and is not confined to that of the political state. Even in the narrower confine of

the latter, the fires of revolution are either violently burning, or, at least, smoldering. Two of the oldest empires in the world, which, together, have more than half of its population (China and Russia) are in a welter of anarchy; while India is in a stage of submerged revolt. If the revolt were confined to autocratic governments, we might see in it merely a reaction against tyranny; but even in the most stable of democracies and among the most enlightened peoples, the underground rumblings of revolution may be heard.

The government of Italy has been preserved from overthrow, not alone by its constituted authorities, but by a band of resolute men, called the "fascisti," who have taken the law into their own hands, as did the vigilance committees in western mining camps, to put down worse disorders.

Even England, the mother of democracies, and once the most stable of all governments in the maintenance of law, has been shaken to its very foundations in the last three years, when powerful groups of men attempted to seize the state by the throat and compel submission to their demands by threatening to starve the community. This would be serious enough if it were only the world-old struggle between capital and labor and had only involved the conditions of manual toil. But the insurrection against the political state in England was more political than it was economic. It marked, on the part of millions of men, a portentous decay of belief in representative government and its chosen organ—the ballot box. Great and powerful groups had suddenly discovered—and it may be the most portentous political discovery of the twentieth century—that the power involved in their control over the necessaries of life, as compared with the power of the voting franchise, was as a 42 centimeter cannon to the bow and arrow. The end sought to be attained, namely, the nationalization of the basic industries, and even the control of the foreign policy of Great

Britain, vindicated the truth of the British Prime Minister's statement that these great strikes involved something more than a mere struggle over the conditions of labor, and that they were essentially seditious attempts against the life of the state.

Nor were they altogether unsuccessful; for, when the armies of Lenine and Trotsky were at the gates of Warsaw, in the summer of 1920, the attempts of the governments of England and Belgium to afford assistance to the embattled Poles were paralyzed by the labor groups of both countries, who threatened a general strike if those two nations joined with France in aiding Poland to resist a possibly greater menace to western civilization than has occurred since Attila and his Huns stood on the banks of the Marne.

Of greater significance to the welfare of civilization is the complete subversion during the World War of nearly all the international laws which had been slowly built up in a thousand years. These principles, as codified by the two Hague Conventions, were immediately swept aside in the fierce struggle for existence, and civilized man, with his liquid fire and poison gas and his deliberate attacks upon undefended cities and their women and children, waged war with the unrelenting ferocity of primitive times.

Surely, this fierce war of extermination, which caused the loss of three hundred billion dollars in property and three millions of human lives, did mark the "twilight of civilization." The hands on the dial of time had been put back—temporarily, let us hope and pray—a thousand years.

If you agree with me in my premises then we are not likely to disagree in the conclusion that the causes of these grave symptoms are not ephemeral or superficial; but must have their origin in some deepseated change in human society. If there is to be a remedy, we must diagnose this malady of the human soul.

For example, let us not "lay the flattering unction to our souls" that this spirit is but the reaction of the great war.

The present weariness and lassitude of human spirit and the disappointment and disillusion as to the aftermath of the harvest of blood, may have exaggerated, but they could not cause the symptoms of which I speak; for the very obvious reason that all these symptoms were in existence and apparent to a few discerning men for decades before the war. Indeed, it is possible that the World War, far from causing the *malaise* of the age, was, in itself, but one of its many symptoms.

Undoubtedly, there are many contributing causes which have swollen the turbid tide of this world-wide revolution against the spirit of authority.

Thus, the multiplicity of laws does not tend to develop a law-abiding spirit. This fact has been noted. Thus Napoleon, on the eve of the 18th Brumaire, complained that France, with a thousand folios of law, was a lawless nation. Unquestionably, the political state suffers in authority by the appeal to law to curb evils that are best left to individual conscience.

A race of individualists obey reluctantly, when they obey at all, any laws which they regard as unreasonable or vexatious. It has always flourished, and the so-called "best people" have not been innocent.

Proceeding to deeper and less recognized causes, some would attribute this spirit of lawlessness to the rampant individualism which began in the eighteenth century, and which has steadily and naturally grown with the advance of democratic institutions. Undoubtedly the excessive emphasis upon the rights of man, which marked the political upheaval of the close of the eighteenth and the beginning of the nineteenth century, has contributed to this malady of the age. Men talked, and still talk, loudly of their rights, but too rarely of their duties. And yet if we were to attribute the malady merely to excessive in-

dividualism, we would again err in mistaking a symptom for a cause.

To diagnose truly this malady we must look to some cause that is coterminous in time with the disease itself and which has been operative throughout civilization. We must look for some widespread change in social conditions, for man's essential nature has changed but little, and the change must, therefore, be of environment.

I know of but one change in environment that is sufficiently widespread and deep-seated to account adequtely for this malady of our time.

Beginning with the close of the eighteenth century, and continuing throughout the nineteenth, a prodigous transformation has taken place in the environment of man, which has done more to revolutionize the conditions of human life than all the changes that had taken place in the five hundred thousand preceding years which science has attributed to man's life on this planet.

Before the beginning of the present mechanical age, the current of living thought could be likened to a mountain stream, which though confined within narrow banks yet had waters of transparent clearness. May not the current of thought of our time be compared with the mighty Mississippi in the period of a spring freshet? Its banks are wide and its current swift, but the turbid stream that flows onward is one of muddy swirls and eddies and overflows the banks to their destruction.

The great indictment of the present age of mechanical power is that it has largely destroyed the spirit of work. The great enigma which it propounds to us, and which, like the ridde of the Sphinx, we will solve or be destroyed, is this:

*Has the increase in the potential of human power, through thermodynamics, been accompanied by a corresponding increase in the potential of human character?*

To this life and death question, a great French philosopher, Le Bon, writing in 1910, replied that the one un-

mistakeable symptom of human life was "the increasing deterioration in human character," and a great physicist has described the symptom as the "progressive enfeeblement of the human will." In a famous book, "Degeneration," written at the close of the nineteenth century, Max Nordau, as a pathologist, explains this tendency by arguing that our complex civilization has placed too great a strain upon the limited nervous organization of man. A great financier once said of an existing financial condition that it was suffering from "undigested securities," and, paraphrasing him, is it not possible that man is suffering from undigested achievements and that his salvation must lie in adaptation to a new environment, which, measured by any standard known to science, is a thousand-fold greater in this year of grace than it was at the beginning of the nineteenth century?

## CRIME AND THE ALARMISTS*

Readers of newspapers and periodicals are constantly regaled with lurid stories of crime. From time to time with great regularity these tales are pieced together to produce the impression that waves of crime are sweeping across the land. Long rows of figures generally go with these tales which purport to tabulate the number of murders, hold-ups, burglaries, etc., in given areas, and sometimes comparisons are drawn with other countries and with other periods. The general effect is always to arouse anger and hatred, to induce legislatures to pass more severe laws, to fill the jails and penitentiaries and to furnish more victims for the electric chair and gallows. It is a commonplace that cruel and hard punishments cannot be inflicted unless the populace is moved by hatred and fear. The psychology of fighting crime is the same as the psychology of fighting wars: the people must be

* From article by Clarence S. Darrow, Lawyer. *Harper's Monthly Magazine.* 153:535-44. October, 1926.

made to hate before they will kill. This state of mind prevents any calm study of facts or any effort to seek causes or even to consider whether causes for crime may exist.

No one need be surprised that crime is so seldom the subject of objective study. It has not been very long since men thought that the whole physical world was operated by miracles. The motion of the earth and sun, the procession of day and night, the seasons of the year, the waves and wind, the flood and drought, the seed time and the harvest—all were defined by no natural laws, but all were dependent upon the whim and caprice of some other-worldly power. Even when some natural law of causation was believed to account for the phenomena of the physical world, the conduct of man was still supposed to lie outside this realm. Sickness and disease meant the possession of the individual by devils, and these could be driven out only by punishments and incantations. The ordinary treatment of disease was by magic and sorcery. For eighteen centuries, over most of Europe, medical men were punished often in the most terrible ways for seeking to find out the causes of disease and for attempting to treat illness by scientific methods. It was the greatest heresy to deny that sickness was due to sin and that pestilence and plague came as a divine visitation of angry gods to afflicted communities. And yet, in spite of restrictive measures and stern persecutions, the doctors persisted, until now no one questions that disease and pestilence are due to natural causes which must and can be removed if the patients are to be cured and infection prevented.

Insanity, too, was for many centuries thought of as possession by devils, and the punishment of the afflicted individual was the favorite treatment for driving out the demon. Hundreds of thousands of unfortunate insane men and women have been put to the severest tortures even down to the most recent times. Sorcery, witchcraft, and magic were the only methods of treatment permitted

and the physician was obliged to risk his liberty and life in treating insanity as a disease, and seeking to understand the causes back of the phenomenon.

Today, no one doubts that disease and insanity can be traced to natural causes and that both can be cured only by discovering the cause and applying the remedies which have been arrived at by careful and objective study of the disease.

The realm of miracle and magic has constantly grown smaller as natural law has come to be better understood. Crime, like insanity and sickness, is a departure from ordinary conduct; but most of the world clings to the belief that it can only be treated as a manifestation outside the realm of natural law. The old indictments read that "John Smith, being possessed of the devil, did wilfully kill," etc., etc. The modern indictments do not mention the devil, yet we still believe that crime is not due to causes, but is an arbitrary act unrelated to the criminal's past. We believe that the criminal should be made to suffer punishment for his act as a matter of "justice" and likewise that the only way to deter others from crime is to make them fear punishment.

In support of the theory that severe punishment with all its attendant horrors, and the psychology of general fear which goes with it, is the only admissible treatment of crime, tables of so-called statistics are always freely called into play. What these figures would prove in this behalf, even if they were dependable, is not easy to conceive.

It is only during a few years that any effort has been made in the United States to gather statistics on the subject of crime. From the nature of our political organization, this movement began with isolated states and cities, and even up to the present time statistics can be obtained from relatively only few and small areas. In the main these figures have been collected by police departments, coroners' offices, clerks of courts, grand juries,

prison superintendents, and sometimes by outside agencies. In short, as the system was built up the methods of gathering statistics have developed in a hit or miss fashion. Naturally, as in all similar cases, the additional work thrown upon the various officials was done carelessly and imperfectly. As time has gone on, however, the collection of data has been improved. The growing care in gathering statistics in itself might easily lead to the conclusion that crime in the United States is on the increase. But still in very few places has there been any attempt to place the collection of data in the hands of intelligent people trained for such a task.

Every student of crime who has commented on these statistics gathered by various agencies has reached the conclusion that in their present state they are of little if any value. In no field has it been more clearly shown that there is a vast difference between the mere gathering of figures and an *intelligent interpretation* of the statistics after they have been collected. Public speakers, magazine writers, and newspapers are periodically presenting long arrays of figures to prove that there is an epidemic of crime in some part of the United States. As a rule there is not the slightest relation between the figures and the conclusions drawn. For example, the figures which are sometimes quoted with regard to the increase of the crime of rape are noteworthy illustrations of the care that must be taken in interpreting criminal statistics. Any one reading the startling statement that in New York state 146 persons were convicted of rape in the decade between 1880 and 1889, while 1297 were convicted of rape in the decade between 1910 and 1919 would be amazed if not horrified at the increase in the sexual passion and its manifestations in this period. Still, their condemnation of their fellows may be somewhat abated when they learn that in the decade showing the largest number of convictions for rape the age of consent had been raised from ten years of age to eighteen. Let us

take another case: 991 persons were found guilty of violating motor laws in Michigan in the three-year period from 1906 to 1909. The number increased to 29,393 in the three-year period from 1919 to 1922. Before reaching the conclusion that this is positive evidence of the increasing recklessness of automobile owners and drivers or of the younger generation it might be well to consider the increase in the general use of automobiles from 1909 to 1922.

Alarmists also forget that the number of violators of law has something to do with the number of laws. Every new criminal statute brings a new grist of crimes. This is well illustrated in the Volstead act and the state legislation covering the same subject. Prisons are now filled with inmates who have only done something which a few years ago was perfectly legal.

Or, again, it is freely asserted that the late comers to the United States commit more crimes than the descendants of the earlier settlers. Those who make this statement forget to take into account the fact that practically all of the later immigrants live in our large cities and industrial centers. It is beyond question that our large urban areas produce more disorder, maladjustment, and crime than our rural communities. And this is true, irrespective of the race or nationality of the people who live under these crime-breeding conditions.

Likewise, the colored population is charged with a share in the commission of crime quite out of proportion to their number. This, too, should always be considered in connection with the fact that in the North they live in industrial centers and in restricted, crowded areas and that colored people, owing to race prejudice and poverty, are much more apt to be accused and convicted than whites.

All this amounts to saying that the agencies which gather statistics of crime and those who quote these statistics in our newspapers and magazines use all sorts of

standards and definitions and overlook explanatory facts which make their conclusions valueless. For instance, in classifying murders some agencies base their conclusions on the police reports, some on the coroner's inquests, some on indictments, and others on convictions. Statistics taken from these various sources differ so widely that they seem almost to have no relation to each other. As a rule, the people who quote statistics to prove their theories simply cite figures without giving their source and without in any way analyzing them to find out what they mean.

In my recent studies in this field I have observed that many books and articles, while calling attention to the uncertainty of figures on crime, at the same time quote the statistics furnished by the Chicago Crime Commission as being the best statistics on crime in the United States now available. Perhaps these are the best. If they are, it is all the more reason for examining them carefully to see just how reliable are the "best" statistics on crime. Let us, then, consider the reports of the Chicago Crime Commission.

In the first place, let me say that I have no idea that those in charge of the Chicago Crime Commission would pretend to give their statistics any such interpretation and validity as has widely been credited to them. They have gathered statistics on crime in the best way they could, conditions being what they are, and in most cases they have simply given them to the public. In the remarks which follow I have no intention of criticizing the work of the Chicago Crime Commission as such, but I only wish to use their reports as an example of the extreme care necessary when drawing inferences from statistics relating to crime.

The Chicago Crime Commission was organized in 1919 to combat what was said to be a crime wave. In the main it is backed by the Chicago Association of Commerce and leading business men of the city. It has pub-

lished several annual reports and a number of pamphlets, all dealing with crime in Chicago. The question is—what light do these reports throw on this problem in the city of Chicago, and, by implication, on the problem in the country at large? Is crime decreasing or increasing? Is there a crime wave?

Let us look at the figures which the Commission has collected on burglary, robbery, and murder. The Commission reports that so far as burglary is concerned there has been a steady decrease from the year 1919 to the present time. For example, in December, 1919 there were approximately 550 burglaries in Chicago, while in the month of December, 1925, there were approximately only 100 cases. As to robberies the figures are likewise impressive. For December, 1919, the number of robberies was approximately 350. In December, 1925, this number had decreased to approximately 200. In both cases the month of December is cited because this month shows the highest number of offenses of this type of any month during the year. The total numbers for the whole year period indicate substantially the same general trend, *i.e.*, for both robbery and burglary there has been a marked and steady decrease during the seven-year period covered by the reports of the Commission.

I have made no effort to verify the figures given out by the Commission for the number of burglaries and robberies, nor in any way have I attempted to ascertain how they were arrived at otherwise than that they were taken from the annual reports of the police department.

However, we assume from these figures, showing as they do such a marked decrease in the number of burglaries and robberies, that when the newspapers and orators talk about the "crime wave" in Chicago their remarks are evidently directed to what they call "murders." For example, one of the most esteemed judges on the bench in Chicago is quoted as having said before the St. Louis Bar Association that "there are at large and unafraid in the

United States at least 135,000 crimson-handed women and men who have unlawfully taken human life," and that the number of those who live by crime is "increasing with incredible rapidity." Where these figures came from we are not told; however, on other occasions the judge has referred to the reports of the Chicago Crime Commission. It is possible that the figures on "murder" given out by this Commission may have furnished him with some basis for his estimate, although the Crime Commission does not pretend to tell how many of the murderers now at large are "unafraid."

Be this as it may, the fact remains that Chicago has been held up to view throughout the United States for its large number of murders, and it is also true that the reports of the Chicago Crime Commission have been widely quoted to support this fact. Let us, then, carefully examine their figures on murder. It may prove a valuable lesson in the interpretation of criminal statistics.

The Commission has made available to the public statistics on murder in Chicago for the years 1919 to 1924:

| *Year.* | *No. of Murders.* |
|---|---|
| 1919 | 330 |
| 1920 | 194 |
| 1921 | 190 |
| 1922 | 228 |
| 1923 | 270 |
| 1924 | 294 |

From these figures the reader might draw the conclusion that the number of murders in Chicago had steadily increased from 1921 to 1924. However, before drawing any such conclusion, or before allowing ourselves to believe that any such numbers of murders have occured in any year let us find out how these statistics were compiled.

With the exception of the year 1919 the figures for the number of murders in Chicago as recorded by the

Chicago Crime Commission were taken solely from the reports of the Coroner's office; 1919 being the first year of the Commission's work, the figures were taken from various sources including the Coroner's office, For the sake of accuracy it should be stated that the jurisdiction of the Coroner extends over the whole county in which Chicago is located. It is the duty of the Coroner to call a jury to determine the cause of death in all cases where it appears that death might not be due to what is termed natural causes. This office, of course, has been created in order to have some agency to investigate cases where death *might have* been brought about by foul means. The investigation is made very soon after the death is reported, necessarily without great care, and with the end in view that where there is even a possibility of homicide somebody should be held to the Grand Jury for further investigation. The Chicago Crime Commission's reports, then, as to the number of "murders" in Chicago in any given year are based upon the fact that the Coroner's jury has in a certain number of cases made a finding of "murder" with a recommendation that the "guilty persons" be held pending further investigation and examination by the Grand Jury.

Let us continue our investigation of these cases which, during these various years, the Coroner's jury reported as "murder." For purposes of convenience let us take the two years 1922 and 1923 in which the Commission reported 228 and 270 murders respectively. We may take these two years simply as representative years of the period covered by the work of the Commission. The records of the Clerk of the Criminal Court of Cook County show that the number of persons indicted for murder by the Grand Jury in Chicago (Cook County) for the year 1922 was 178. The number of persons indicted for manslaughter was 30. In the same year (1922) 38 persons were convicted of murder and 28 of manslaughter. In the year 1923 the number of persons indicted for mur-

der by the Grand Jury was 179. The number indicted for manslaughter was 46. The number of convictions for murder was 44 and for manslaughter was 18. Thus in the two years 1922 and 1923 the total number of "murders" *reported* by the Chicago Crime Commission (Coroner's Jury) was 498. Whereas in the same two-year period the total number of *indictments* for murder by the Grand Jury was 357 and the total number of *convictions* for murder was 82.

Let us see if we can find out with reasonable certainty what became of the 416 "murderers" reported by the C.C.C. who were not convicted during the years 1922 and 1923. In the first place we already know that in 141 cases the Grand Jury refused to indict. Then of those who were indicted for murder by the Grand Jury in this two-year period according to the reports of the C.C.C., we find that out of a total of 326 defendants—the total number which *they* report as having been indicted during the period under consideration—138 were convicted; 48 were dismissed by the State's Attorney without prosecution; 41 were stricken off the docket with leave to reinstate (which order almost always means dismissal); 99 were found **not guilty.**

The first point to be made about these figures concerns the matter of the number of convictions for "murder." The total number of convictions for murder for the two-year period 1922-3 as shown by the records of the Clerk of the Criminal Court, was, as we have already stated, 82. The Crime Commission shows the number of convictions for murder for the same period to be 138. How shall we account for this difference of 56? Of course it is possible that all indictments are not disposed of by the courts in the same year in which they are returned. Each year, no doubt, some cases are tried, the indictments for which were returned in the preceding year; but this would make no notable difference when the figures are taken for a two-year period. The dis-

crepancy between the two sets of figures is mainly to be accounted for by the fact that the Crime Commission in making its tabulation of "murders" does not distinguish between manslaughter and murder. All are listed as murder. As a matter of fact during these two years there were 46 convictions for manslaughter. Manslaughter, by no possible definition of the term, is synonymous with murder, although a verdict of manslaughter may be found under an indictment for murder in cases where death was caused without malice, or through accident due to gross carelessness.

It is at once manifest that there can be no possible excuse for the various statements which are so glibly and carelessly made as to the number of "murders" in Chicago during any given year. The number of "murders" put down by the Crime Commission for the years 1922 and 1923 was 498. The number convicted for murder during the same period was 82, or less than one-sixth the number constantly heralded to the world. It will not do to say that the State's Attorney and his assistants are dishonest and incompetent, and no one pretends to account for the discrepancy in the above figures in this way. The story has been practically the same in all administrations in Chicago, and no doubt in other cities as well. No one can pretend that the findings of the Coroner's jury gives any sort of evidence of the actual number of murders. On the contrary, there is every reason for taking the number of convictions as the real basis for estimates of the number of murders during any given period.

Even indictments returned by the Grand Jury, although far superior as a basis for statistical computation to the reports of the Coroner's jury, do not furnish any accurate evidence of the number of murders in a city like Chicago. It is a well-known fact that although the evidence presented to the Grand Jury may be rather carefully prepared, nevertheless, the Grand Jury investigation is purely one-sided and almost entirely under the control

of the State's Attorney or his deputies. The defendant is never present nor is he represented. In the two years which we have been considering there were 357 indictments for murder in Chicago—or, rather, in Cook County, the jurisdiction covered by the Coroner and the Criminal Court. As we have said, these 357 indictments resulted in 82 convictions for murder; 89 of these indictments were dismissed by the State's Attorney after full consideration. This left a little over one half the number shown by the Coroner on which the State's Attorney even asked a trial. And out of these only 82 were convicted of murder while 99 were found not guilty of any crime.

It should be clear that no person can possibly use the figures of the Crime Commission as an indication of the number of murders in Chicago without the most serious reflection upon the Grand Jurors and upon the State's Attorney, to say nothing of the Judges of the Criminal Courts. And no one pretends to make any such charges.

But perhaps some one will think that the foregoing simply represents a more or less adroit juggling of figures in the interest of proving my point. Statistics are notoriously slippery affairs. To be fully certain what these figures mean it would be necessary to take the complete history of each individual case from the time it left the Coroner's office until it was finally disposed of by the courts (assuming that it got that far). Obviously, limitations of space will not allow any such exhibit in this place. However, suppose we take at random one month during this two-year period and see the character of the "murder" cases reported during that month and what befell them.

In the list of twenty-nine possible defendants all of them were classed as "murderers" by the Coroner's Jury and the Chicago Crime Commission. And yet it is extremely unlikely that more than two of them (Cases 21 and 23) were really cases of out and and out murder, and both of these were unsolved. Is this feeble list for

March, 1923, the red-handed menace that is so luridly pictured as an army in mortal combat with organized society? Rather it is a fair sample of the results of poverty, hard luck, ignorance, maladjustment, and destiny that in some form come to light in every great city filled with the flotsam and jetsam of humanity. It is a condition, and it needs careful study to find out what should be done and what can be done. It does not call for blind hatred and stern revenge.

What general conclusions can be drawn from the object lesson just exhibited in our analysis of the statistics on crime compiled by the Chicago Crime Commission? One thing is certainly clear—no intelligent person can examine carefully the statistics which are at present available and come to any satisfactory or defensible conclusion as to the number of crimes committed in the United States, or whether they are increasing or diminishing in proportion to the population, or the cause of any increase or diminution. The study of statistics in regard to crime, as in many other matters, leaves one in a hopeless maze. It will take years of careful preparation and thorough, unbiased gathering of objective statistics before any general conclusion can be reached in this way. It is, however, safe to say that statistics do not show that there is an increasing trend of crime in America. On the whole, it probably remains fairly stationary—with variations up and down now and then due to all sorts of reasons. Probably, on the whole, there is a tendency downward, especially if allowance is made for the new crimes that are constantly being created by statute and which add materially to the tables of law violation.

The growing use of the automobile has had a positive tendency to increase crime materially. It is a new lure that is hard to withstand. Men and women mortgage their homes and their beds to get them, and of course boys borrow and steal them. The indiscriminate use of the automobile in crowded cities has added largely to the

coroner's returns, and many accidents appear in the tables as murders, although the only element even of homicide is careless or reckless driving. Sometime life may adjust itself to the automobile, but it will be a long time before men, women, and children can withstand the lure and before the accidents incident to the use of the automobile be materially reduced.

The Volstead act and kindred state laws have furnished a great many additions to the reports of crimes. Many of these are classed as murders, many others as unlawful buying and selling. It is inevitable, in a mixed people like ours, with their diversity of habits and customs, that a drastic, tyrannical law, which makes criminal acts that carry with them no feeling of wrong, can have any other effect than to add to the list of crimes. Prohibition will continue to reap this harvest until it is settled whether the government shall recognize the habits of its citizens or whether the people shall be compelled by brute force to yield what they have long believed to be their rights.

Those who believe in sterner laws and harsher treatment of criminals are always drawing comparisons between America and England. Different parts of England show marked differences in the statistics of crime. Liverpool, for example, shows more burglaries than New York, and about the same as Chicago, and nearly twice as many murders and other serious felonies as London. The difference is most likely accounted for by the seaport location of Liverpool which adds to the mixture of races and peoples. Still, it is true that there are many more felonies in the United States than in England in proportion to the population. This condition cannot be accounted for by the severity of punishment in England. In many important instances the American penalties are much harsher and more brutal. The executions in England are fewer in proportion to the population than in America and, in cases where death sentences are pronounced, a much

larger proportion receives clemency there than here. From all that can be gathered, it is probable that China has a smaller crime rate than England, though it is not possible to find statistics of crime for China. Regardless of the question of crime, few Americans believe that England is, on the whole, a more desirable place for living than America, much less is China.

Other things being equal, all new countries have a higher crime rate than old ones. This is due to many reasons, not all of which apply in all new countries. The residents of England are a homogeneous people. This is true of all old countries. They lack many of the inducing causes that lead to crime. The English people have been made alike by centuries of molding and welding. They have from long association formed common customs, habits, and views of life; in other words, folkways —which make them one people. An old country inevitably develops a sort of caste system; each person takes his place without hope of change or advancement. The individual grows to accept his lot in life.

When we remember that crime means the violation of law, which in turn means getting out of the beaten path, it is easy to see why it is more common in new countries, where the paths are faint and not strongly marked, than in old countries where the paths are deep. It is only one hundred and fifty years since the United States gained its independence. It then had some 3,000,000 people. Since that time it has grown to about 115,000,000. This necessarily means that it has drawn from almost every country of the earth. These people have brought all kinds of religions, social customs, political ideas, temperaments, and ambitions. Probably no such heterogeneous combination was ever before brought together upon the earth. Most of these people came here to improve their condition, to get out of their caste. Their children are still hopeful that they may rise. The subduing of natural resources has built our great cities and filled them with a babel of

tongues and a medley of temperaments, and with every religious, social, and political idea in the world. The higher wages and better opportunities have made the people venturesome and aggressive. The larger individual freedom and greater independence of individual action have made collisions more inevitable and severe.

Most of the crime in the United States comes from our industrial centers. Our cities have always been settled by a mixture of the peoples of the world with varied feelings and emotions, and with the individual customs and habits of their native lands. In the main these have been the poor of Europe. They have come with new hopes and ambitions, moved by intense desires. The industrial cities have been alternately prosperous and idle. Aside from the natural emotions of love and fear and hate, there has been the constant battle with employers and between union and non-union men. Such a medley of conflicting peoples and emotions has always been a prolific soil out of which violations of habits, customs, and laws inevitably grow. No other country has ever had so many antagonisms, such a fertile soil for combat and discontent. Australia and Canada, although new countries, have in the main a homogeneous people and a rural population. The statistics of crime of the rural communities of the United States are not unlike the statistics of rural communities in Canada and the other countries of the world.

The population of the United States has been constantly augmented by the poor of other countries. These have left an old social organization with fixed habits and have been thrown into a social environment new and strange. Such a condition has always been disorganizing to every group. Old customs and folkways which act as restraints are left behind, and inevitable disorganization is the result. The study of our recent immigrants shows the difficulty of new adjustments and the disintegration and misfortune that comes to individuals and groups.

It is not the terror of brutal punishment that holds the units of society in their place. It is customs and habits. It is long familiarity with the beaten paths. People think and act and live as they are wont. They stay in grooves. Any sudden change jolts them from their ways and sets them loose to find or make other paths. To believe that men are kept in a certain line by fear is a crude conception at variance with experience and psychology alike.

## LAWLESSNESS [4]

"Lawlessness is sporadic or unorganized revolution, a fact which receives too scant recognition. Of course there are various kinds of revolution. There is, for instance, revolution against a bad administration of good laws, which may be salutary in so far as it aims to promote law and order. Or there is revolution against a crystallized system of bad laws, which likewise may be justifiable. Or, again, there is revolution against law and order itself, which is always evil and disastrous. The lawlessness which is imperiling our nation is chiefly of the latter sort. The very citizens who deprecate revolution are themselves revolutionists if they confine their obedience to law only to those laws which protect their interests, and which do not run counter to their desires."

[4] From article Law and Order, by Charles H. Brent, Bishop of Western New York. *World's Work.* 42: 266. July, 1921.

# LAWS

## OVERPRODUCTION OF LAWS[1]

How many laws must a nation have to be properly regulated? There seems to be no recognized standard of comparison. According to an estimate by W. P. Helm, Jr., we now have in force throughout the United States, counting federal, state, county and municipal legislation, about two million laws and ordinances, or one to every fifty of our population. And the supply of laws is increasing by about two hundred thousand a year. Thus for every seven increase in population we have a new law. In 1923 about fifteen thousand new laws were enacted by forty-three states. In the even-numbered years the state law crop is about three thousand five hundred. But the average crop year in and year out is about twelve thousand new state laws and three hundred federal laws, without mentioning the reams of private acts. And these make up only a small part of the grist of the legislative mills, for besides Congress and the forty-eight state legislatures there are more than three thousand sets of county commissioners, and there are the aldermen or a town council in the fifteen thousand incorporated cities, towns and villages. Allowing ten ordinances a year as the output of each of these eighteen thousand county and municipal councils (an estimate far below the truth) gives us one hundred eighty thousand as the annual crop of ordinances. This number, plus the state and federal enactments, equals about two hundred thousand doses as our annual quota of legislative medicine.

[1] From article by E. V. Wilcox, '92. *Harvard Graduates' Magazine.* 33: 386-93. March, 1925.

Every little while some timid citizen asks if we are not taking too much medicine of various kinds such as cardiac, antiscorbutic, expectorant, diuretic and legislative. It is quite possible. As far back as in 1853 Herbert Spencer made sport of over-legislation. Said he:

> Though we have ceased to assume the infallibility of theological beliefs and so ceased to enact them, we have not ceased to enact hosts of other beliefs of an equally doubtful kind. Though we no longer presume to coerce men for their spiritual good, we still think ourselves called upon to coerce them for their material good, not seeing that the one is as useless as the other. Innumerable failures seem so far powerless to teach this. Take up a daily paper and you will probably find an article on the corruption, negligence or mismanagement of some state department. Cast your eye down the next column, and it is not unlikely that you will read proposals for an extension of state supervision. Thus while every day chronicles a failure, there every day reappears the belief that it needs but an act of Parliament and a staff of officers to effect any end desired.

Might we not have to hold our breath and shut our eyes too much of the time in order to believe in the efficacy of the increasing flood of impossible legislation? If advice were all I had to sell, and if it seemed to me that the market price of advice was too low and everything else too high, I might wish for a reduction in the price of sugar, gasoline, soap, strawberries, coal, flour, railroad fares, shirts, theatre tickets, taxes, haircuts and cigars. If I kept on wishing long enough for such a millennium, I might bring myself to believe that by a simple legislative sleight-of-hand performance the government could interfere with the industrial machinery, and make all these other prices come down to where I wished them to be, while increasing the market demand and price for my store of advice.

The comedy of the situation lies in the fact that thousands of persons apparently believe that all of us need regulating all the time in all matters. We must have our price regulators for coal, sugar, wheat and gasoline as well as our liver regulators, packer regulators, maternity bills and railroad regulators. Last year in forty-

three state legislatures 1897 bills regulating railroads were introduced, and 377 of them were enacted into law. The last Congress in December alone introduced seventy-five bills affecting the railroads, or three a day. There are now in force twenty thousand state and federal laws regulating railroads. It is, of course, quite impossible for any human being to carry them all in mind and therefore impossible to say whether the railroads are behaving unlawfully or not. In fact, since there are many glaring incompatibilities and mutual contradictions in this mass of legislation one could hardly blame the railroads for exercising their own choice of the laws with which they would try to conform. In a recent state law there is the interesting provision that when two trains meet at the intersection of two railroads "both trains shall come to a full stop and neither train shall proceed until the other has passed." And the train crew must solve the puzzle of how to move without breaking the law.

When the Roman Empire became so littered up with laws that business couldn't move, a legislative inventory was taken and all but two thousand of their laws went into the ash can. Recently a wave of rebellion against overregulation has spread through Europe. Dictators have arisen with knives sharp enough to cut the gordian knots of red tape—Dr. Zimmermann in Austria, General Primo de Rivera in Spain, and Mussolini in Italy. If two thousand laws were enough for the Roman Empire, do we really need two million and the unlimited coinage of laws at the rate of two hundred thousand a year or two million a decade? Wouldn't ten thousand laws insure equally exemplary conduct and regulate us quite handsomely?

A Chicago manufacturer was lamenting this situation one day when I called at his office. Said he:

> So long as politicians and bureaucrats think the government should be by turns a wet nurse, a spy, and a common scold toward all business, we are in for a bad time. Political parties are seemingly running a race to see which one can interfere the

most with private rights and private affairs. We had a long bitter struggle to win the right of free speech, of a free press, and the right to worship God as we choose. And now we have a big fight for the right to mind our own business and to be let alone while so doing. A citizen has the right to conduct a business, and the government ought to protect him in that right as far as possible, rather than scold or indict him for doing business. The government is riding business on the neck so hard that in recent years production and distribution require much more attention to politics than to economics and salesmanship. And government regulations, supposedly in the interest of the public, often do little beyond increasing the cost of manufacture and distribution service. Just the other day I heard a legislative enthusiast explaining that society is ultimately to be saved by a universal, selective system of examinations. In his scheme all existing political boundaries are to be rubbed off the map, the nation is to be divided into regions, each with a board, and the whole country under a supreme directorate of specialists in ethics, genetics, sociology, birth control, mathematics, anthropology, psychoanalysis, free verse, and cosmetics. And everybody will be correctly rated, graded, ranked, and classified by these experts.

And while the House of Peers witholds its legislative hand,
And noble statesmen do not itch
To interfere with matters which
They cannot understand, etc., etc.

we may remind ourselves that it's different in the United States. In the picturesque language of Senator Reed:

Federal officers by the thousands swarm over the country, assuming a right of espionage and arrest, repugnant to the genius of our government. There is scarcely any activity in life from the rearing of babies to the massing of armies which is not now subject to the surveillance and jurisdiction of government officers, agents, spies and courts.

Just how the government can go into partnership with maternity, or paternity for that matter, is hard to understand. To be sure our Maternity Act of November 23, 1921, provides "that no official in carrying out the provisions of this act shall enter any home or take charge of any child over the objection of the parents." Thus the act falls a little short of legalizing house-breaking and kidnapping. That's reassuring as far as it goes. But the wording of the act permits these officials to do anything else under heaven so far as the appropriation will

stretch. Maternity is a weighty matter and merits the thoughtful attenion of physicians and educators as well as of the mothers and fathers concerned. But was it really crying for regulation by government machinery?

Adding together Congress, the state legislatures, and the county and municipal councils gives us a neat total of one hundred thousand persons or more engaged in the ceaseless brewing of laws. A careful estimate of the cost of operating our legislative mills in 1915 indicated that we paid $14,250,000 for the manufacture of 16,034 state and federal laws of rather doubtful value, or about $900 per law. Now the tragic and comic side of the legislative flood has already been noticed. The farcical aspect appears when we compare the bills introduced with those which are passed. Fortunately there is a high rate of mortality in these bills. The Sixty-Fifth Congress considered 21,919 bills and enacted 349. The Illinois General Assembly in 1923 considered 1404 bills and passed 358, while in Oregon the proportion was 644 to 295, in Massachusetts 2000 to 492, and in Nebraska 975 to 199. More than 60,000 bills were brought before the state legislatures in 1923 and only 15,000 were passed. That was something to be thankful for—we escaped 45,000 of them.

And just to fill in the picture, I found that from the First to the Sixty-Seventh Congresses inclusive 49,064 federal statutes were enacted. Then I studied the mortality of bills in the last eight Congresses and found that only one in thirty-five survived. At that rate 1,717,000 bills have been introduced into Congress since the birth of the nation. Using the ratio of four bills per law for state legislation, which seems to be about the usual outcome, yields us six million bills in the list which has been considered by the state legislatures. In other words, we might today have been trying to comply with nearly eight million state and federal laws and possibly fifteen

million county and municipal regulations. Let us be thankful for the high death-rate among laws both before and after birth.

But to my jaded imagination we are still legally in the realm of the impossible. How can there be two million matters on which legislation is required to regulate a small parcel of one hundred ten million fairly intelligent and reasonably well-behaved people? If we did not actually have those two million laws in print I should vehemently deny the possibility of conceiving two million subjects requiring even an after-dinner discussion, let alone legislative consideration. Perhaps some industrious person has taken the words from an unabridged dictionary and arranged them in every possible order according to the law of permutations in our school arithmetic. We are surely a versatile people. We have more schools, more automobiles, more chewing gum, more railroad mileage and more laws than any other nation.

And think of the plight of the New York policeman. He has a list of sixteen thousand ordinances which he is expected to enforce. Picture yourself memorizing sixteen thousand ordinances, or even codifying them in a memorandum book to be carried in a convenient pocket. After a hard day on the beat could you conscientiously swear that you had definitely tried to make the public follow every one of the sixteen thousand rules?

Moreover, if I were disposed to be critical I should complain of the unequal distribution of laws. We are not all treated alike in this matter. For example in the three legislative years 1911, 1913 and 1915 exactly 12,489 bills were introduced into the North Carolina legislature, and only 2541 in North Dakota. Does this mean that the Tar-Heels are five times as wicked as the Flickertails? Otherwise why must they be so much more voluminously legislated? And, again, it's not quite clear why we need so many more new regulations one year than another. But the output of statutes by the various

Congresses has varied all the way from seventy-seven to seven thousand twenty-four. We must have been near perfection when seventy-seven legislative treatments would suffice, and in a bad way when seven thousand twenty-four doses were needed.

How do our professional lawmakers find time to investigate the purposes, bearings and possible effects of all this flood of legislation? A shock of disillusionment awaits the anxious inquirer in that field. Taking the Illinois General Assembly of 1923 as an example of the usual procedure, we find that bills were poured into the legislative hopper without any slackening throughout five of the six months of the session, January to June 20. About 82 per cent of the acts finally passed were handled between June 11 and 20. As usual the Solons simply fiddled along till the last ten days, and then enacted laws wholesale without adequate consideration and with only a dim notion of what had really happened. Undesirable legislation was of course withheld till near the end and then rushed through.

Thus we are legislated into life, through life and out of life. Even the legislators who sponsor bills may not know what the bills mean. They merely feed them into the lawmaking mill. Obviously this state of affairs leaves the door wide open to the political meddlers, social theorists and experimental economists who want to try their nostrums and panaceas on a defenseless public. Incidentally they usually have an ax to grind. And these busybodies swarm about the lobbies of legislative halls, peddling their political wares among susceptible legislators. The Solons, in turn, being relieved of the necessity of drafting laws, are free to devote most of their energies to fireworks, oratory and political fences.

In the meantime courts, lawyers and populace are simply dumfounded by the avalanche of laws, laws often self-contradictory and, at best, mutually contradictory, laws which may convey any one of a dozen meanings

or no obvious meaning at all, laws which settle nothing but merely lead further into the endless quagmire of litigation. Last year it took thirteen thousand permanently recorded decisions of the highest courts, covering one hundred seventy-five thousand pages, to explain in part what the annual crop of twelve thousand statutes meant. The courts have to spend 90 per cent of their time determining what the laws mean and 10 per cent on whether the defendants have broken them.

Thus laws, lawyers, and law makers in a dizzy merry-go-round continue to befuddle the people. No individual can possibly have acquaintance with this mass of laws nor read them all, however hastily, even if he had nine lives. Nor can he know whether he is a law breaker or a law-abiding citizen. Nor are the courts quite sure about it. If our two million laws were reduced to two thousand it might be within the capacity of the human mind to master their meaning. But so long as laws are as numerous as gnats and blackberries there is small hope of any outcome except confusion worse confounded. Is it to be wondered at that the adjournment of Congress and the state legislatures brings a universal sigh of relief?

## LAWS MEN BREAK AND WHY[2]

Let us therefore consider certain laws which men will not respect and obey. The automobile laws restrict speeding, parking, lighting and rules of the road. Pennsylvania has a maximum speed of thirty miles per hour, yet automobiles are advertised to do fifty, seventy-five or even one hundred miles per hour and the owner endeavors to demonstrate that his car can attain such speed. He wants to go as fast as he pleases, drive wherever he pleases, park where he pleases and use such lights as he pleases, but the other fellow should respect the law in all particulars.

[2] From article by the Honorable Edwin M. Abbott, Philadelphia. *Annals of the American Academy.* 125: 35-8. May, 1926.

In the state of New York adultery is the sole ground for absolute divorce. Yet how many inmates in the penal institutions of that state are serving time for that offense? The Mann act covers the same offense under federal jurisdiction, but we all know that of the thousands of such transgressors few find their way into our courts. The criminal is only the poor fool who gets caught and can not adjust his differences by the monetary scale.

Gambling is another subject which touches the personal liberty of our citizens. In Pennsylvania gambling is not a crime. But certain kinds of gambling are. It is a crime to bet on an election, and while the penalty is not serious, everybody disregards this law and we never hear of prosecutions. The maintaining of a gambling establishment, betting on horse races, being a common gambler and setting up lotteries or gambling devices are all contrary to law, but in the sweet name of charity some churches often recognize the innocent lottery and forget that every sale of a paddle or a chance on the sewing machine or cake is contrary to the law of the commonwealth.

How many of us are conscientious in our returns to the federal government for our income taxes? We are instructed that our winnings at poker or other card games must be returned as a part of our income, and that our losses should not be deducted. Have you ever met a winner who makes such a return? Are we honest with Uncle Sam in our return upon which our contribution to the support of the government is based? The commandment "Thou Shalt Not Steal" and the laws founded thereon are equally applicable to defrauding the federal government or an individual.

And that brings us to the crime of smuggling. It sounds like a harsh word, and we think of the pirates of old when we contemplate such a crime. But today it is a social event, as returning from a trip abroad with jewelry, fine linen and other purchases, the erstwhile

"good citizen" contrives to get his booty home without paying the duty, and later, in the social circle he boasts how it came through with his political influence, or the tip to the Customs official. And this opens up the subject of bribery, which is such an extensive one that it reaches into many branches of trade and into every avenue of activity. Public officials seem to be the targets for bribery, and we should be thankful that most of our public servants do not succumb to the temptation. But citizens who want some favor or special privilege will not hesitate to go into our legislative halls, official offices or out into the highway and attempt by the use of money to secure what they desire. Have we carefully considered how the modern lobbyist secures special legislation? Does he always obtain votes by moral suasion—or argument?

The enforcement of the Volstead act has opened many channels for the illegal use of money. Disregard of the eighteenth amendment, which is a part of our Constitution, and as much a part of the Constitution as the Bill of Rights, has led to the commission of many other crimes beside that of bribery. A most amazing condition has resulted to the body politic through the honest attempt in this city to enforce the prohibition laws. Perjury struts naked through our halls of justice, and disregard for the sanctity of the oath prevails in most of these cases. Public officials, police officials, magistrates, grand jurors, petit jurors and even some judges upon the bench forget that they are all sworn to uphold the Constitution and laws, both of the nation and the commonwealth, before they enter upon the activities of their office. Witnesses in court no more regard the oath as binding them to tell the truth, but use their testimony to their own advantage, irrespective of its truth or falsity. If jurors do not like a law they acquit defendants who are charged with transgressing it. If jurists find the law obnoxious to them they discharge malefac-

tors convicted of breaking it. If police officials have been tainted with avarice and have fallen for a price, then memory becomes hazy and faulty, and so we have farce after farce enacted in what should be courts of justice.

There are many other crimes committed in the general disregard of law. The family physician, pressed to the limit by the exigencies of necessity, commits abortion to save the reputation of the daughter of the family which he has attended for many years.

The election official, ambitious to ascend the political ladder, takes a chance in disregarding election-law restrictions.

The so-called "good citizen" salves his conscience with exorbitant rentals of his real estate and does not consider the moral character of his tenant or the illegal purpose for which it is used.

The unthinking adult in the social circle or in the home disregards the restriction forbidding the furnishing of cigarettes to minors.

Blasphemy is still a crime, but you meet it at every corner.

The protection of health, sanitation, child-labor and factory laws to the minds of many are impediments, and if one can forget them and evade them, well and good.

The blue laws are still upon the statute books. Many of them are relics of colonial days. Most of them are disregarded. Where is the legislator who will have the temerity to introduce a repealer for one or all of these acts, which are never observed?

The narcotic drug act and the pure food act are excellent pieces of legislation which many agree should be stringently enforced, and yet the drug addict is with us. The dispenser of such poison is only spasmodically run to earth. He even preys upon our school children and enters our homes and offices, increasing this nefarious traffic in many communities. We should be thankful

that in this city a concerted effort has been made by our judges and police which has practically eliminated this terrible practice.

The pure food restrictions regarding adulteration or misbranding are evaded in many instances, and detection too often is punished with the imposition of a small fine. Seldom does any one receive a term in prison for this offense.

I might go on ad infinitum. The legislature decides we shall not have daylight saving, and individuals resent such action and do as they please. One state made it a crime to advance clocks or watches, and such an act passed the Pennsylvania legislature in 1925, but the governor vetoed the bill. Last summer I passed through a state where changing of time-pieces constituted a crime and when I asked a good citizen if his clock was not registering contrary to law, his reply was, "Who pays any attention to such a law?" That seems to be the mental attitude of many citizens today.

The anti-trust laws are dying of dryrot, and usury prevails in many garbs. The bonus is the most popular way of circumventing the 6 per cent interest limitation.

Barratry and champerty are ancient crimes employed by the modern ambulance chaser, cooperating with certain lawyers and physicians. But all evade prosecutions for these offenses which they are continually committing and which are simply denoted unethical but not criminal.

Foretelling the future is also a crime, but our best citizens encourage these fortune-tellers and thus contribute support to another class of law breakers.

I have only enumerated what must be but a partial list of laws that are only respected in the breach.

But, remember, for every policeman who accepts a bribe there must be some one who gives it. For every bootlegger who dispenses illegal beverages there must be citizens who purchase them.

The so-called crime wave is running rampant throughout the land. The populace is in hysteria in many sections. Murder, robbery, burglary, arson, rape, blackmail, kidnapping, larceny and kindred crimes are reported from every corner of this great nation.

The highwayman contends that all laws are alike and he will not respect the inhibitions against stealing. The foreigners in our midst do not respect our restrictions on his ideas developed in Soviet Russia or elsewhere and so he appropriates to his own use just what his perverted conscience demands.

How are we going to remedy this menacing and deplorable condition? The first thing to do is to try to reawaken the consciousness of all true Americans.

## LAW, LIBERTY, AND PROGRESS[3]

Railing at law and law-makers has become of late one of our popular national sports. The attack is sometimes aimed at federal legislation which seems to invade the rights of the states; sometimes at all legislation, whether state or federal, which seems to restrict the personal liberty of the railer. Some of the critics resort to invective, some to sarcasm, some to paradox, and now anyone who advocates a law for social betterment does so at his peril. He is liable to be classed with promoters of nostrums and cure-alls and may even be stigmatized as an idealist.

The writer is not blind to the folly of trying to reform the world. He is quite conscious of the unwisdom of many of the efforts to reform small parts of it. He ranges himself at the very outset with those who say that we have too many laws, both state and national. He would like to see conduct regulated more by manners and custom and less by law. When law is resorted to, he

[3] By Henry W. Farnam, formerly Editor of Yale Review; Author of "Economic Utilization of History." *Yale Review.* n.s. 15: 433-47. April, 1926.

believes the presumption, in case of doubt, to be in favor of state as against federal action. But to say that we have too many laws is a truism which gets us nowhere, unless we can agree upon some principle of elimination. To complain of too many laws is like complaining that there are too many automobiles on the roads. Every automobilist who is not interested in the motor-car business would doubtless subscribe to this doctrine. But, if he is asked which automobile he would eliminate, he will certainly not remove his own. As every automobilist will make an exception in his own case, the universal assent to the proposition that we have too many automobiles has no meaning, because it connotes something different to each one who uses it. The same is true of law. Those who are most vigorous in denouncing the multiplicity of laws are the last ones to surrender the particular law in which they are interested. We have the *reductio ad absurdum* of the slogan "too many laws" and "no more amendments" in the case of those who, while waxing indignant at the multiplicity of constitutional amendments, would yet favor an amendment of their own, limiting amendment. It is time that those who would express an opinion on the very important subject of legislation should follow the method to which we owe all scientific progress and study causes by the observation of facts, before they indulge in denunciation or pillory those whom they consider guilty of political heterodoxy.

Let us look then for the cause of legislation and ask, first of all, why do we have any laws? Why do we not let each one do as he pleases, capture his food and his raiment and his women wherever he can and keep them until a stronger takes them from him? The reason is that in the end man can get much more out of life by an orderly system of production and exchange and by observing certain standards of conduct. Thus property rights and family rights are recognized, and, if they are

to be secured, those who violate them and prefer a more primitive type of existence must be restrained or invited to go elsewhere. Robbery and homicide have, therefore, become taboo between individuals of every civilized political unit or state, though still recognized as proper and even praiseworthy between states acting as corporations.

The great mass of our civil law and many of our criminal laws have to do with either the family or economic relations, and concern the production, exchange, consumption, and distribution of wealth, including its transmission from one generation to another. Law reflects, either as effect or cause, the economic system which which it is made to support. Obligations were insisted upon under the feudal system which are as inapplicable to a capitalistic system as the law of a capitalistic system is to communism. All law must adapt itself to the economic conditions of time and place. A pastoral people requires one set of rules, an agricultural, another, an industrial, a third.

Now, the peculiarity of modern law is that it has had to adapt itself to changes in the technique of wealth production and distribution more revolutionary than any known to have taken place in any similar period of the world's history. Our economic life has changed more in one hundred fifty years than in the previous one thousand five hundred years, perhaps in the previous five thousand. These changes are familiar to every educated person. Their reaction on legislation is not always understood. It has been peculiar and almost paradoxical. When the "industrial revolution" struck England in the eighteenth century and began to be anticipated in France, industry was based upon the guild system. But the legislation which supported it, such as the Statute of Apprentices of Elizabeth in England, blocked the way to the factory system and prevented the utilization of the enhanced productive power which now became possible. Hence Adam Smith and the Physiocrats stood for freedom of

industry and commerce as epitomized in Gournay's phrase "laissez faire, laissez passer." "Hands off" thus became the slogan of most economists for nearly a century, and some of them still repeat it.

And yet within a very few years the factory system produced evils so flagrant that nothing but legislation could stop them. In the words of Gibbins, there was "a fearful spread through the factory districts of Manchester of epidemic disease owing to the over-work, scanty food, wretched clothing, long hours, bad ventilation, and over-crowding in unhealthy dwellings of the work people, especially the children." To remedy the worst of these evils Parliament passed in 1802 the first factory act. Though this soon became a dead letter, and though for many years it was impossible to arouse the interest of the ruling classes in the suffering of the children and women, yet through the persistency of a few men who saw farther than their contemporaries—"professional reformers" as they would now be called—other acts were passed. Peel's act became the forerunner of a long series of laws in all of the industrial nations of the world, designed to check the evils which were found to accompany the new industrial system. Thus, while the modern economic era was ushered in by a demand for the repeal of laws, its progress has been a prolific source of new legislation. In a short article it is impossible to enter into a full enumeration of the many changes commonly included under the general term progress, which have stimulated legislation. It will suffice to mention some of the more familiar types.

One of the most important of these changes is the revolution, not only in industry but in our daily life, caused by mechanical and technical inventions. Half a century ago the main stress was laid upon the changes in industry and labor conditions effected by such things as the steam-engine, the power loom, the steamship, and the railroad, but the more recent advances, such as the

development of hydro-electric power, the gasoline engine, the airplane, the movie, the telephone, and the radio, have influenced the daily life of everyone, whether engaged in industry or not. Traffic on the highways has been revolutionized by the automobile as much as long distance travel was revolutionized by the railroad, and with it have come accidents necessitating the examination of drivers, the registration of cars, and innumerable traffic rules which, drastic as they seem, and violative of what seemed the fundamentals of personal rights in a horsedrawn age, still fall short of checking the evil. Accidents are increasing at an alarming rate, and deaths by automobile figure prominently in our vital statistics. Even the harmless pedestrian is no longer allowed to indulge in Charles the Second's pastime of sauntering, but broad white lines show him where he must cross the street. He may not rest in peace if he is willing to get killed but goes to his grave branded as a "jay-walker."

Traffic regulations are cited as a type of law growing directly out of new inventions, because they are familiar and generally non-controversial. They are commonly accepted as necessary even by those who violate them. But the reasoning that applies to them applies to the legion of laws that come under the head of factory and safety legislation, such as laws requiring safety appliances, restricting the labor of women and children, prescribing precautions against fire and disease, not only in factories but in mines, in quarries, and on the sea.

Each new law in this long series had to overcome stiff resistance when first introduced, but few laws providing for better sanitary conditions, or for shorter hours of labor, or for the general welfare of workers have been repealed, though some have been modified in detail and some have been overthrown on constitutional grounds by our courts. In other words, it is fair to say that the general experience of mankind has justified the enactment of laws regulating the conditions of labor. The

reason for this is obvious. New inventions and and new methods have led to new evils, economic, sanitary, and social, which do not cure themselves and which have come so suddenly that there has been no time for the creation of a customary law, still less of social conventions, to deal with them. In the time of Queen Elizabeth, Sir Thomas Gresham observed that bad money drives out good money, and we have now learned that this so-called Gresham's law applies to many things besides currency. If two manufacturers are competing, and one can make money by employing labor under unsanitary conditions, his competitors are almost forced to descend to his level, even though it may be for the interest of the employers as a group and of society in the long run to conform to higher standards. These higher standards can be maintained only by a general rule of action binding on all and made either by governmental authority or by the cooperative effort of some strong guild or association, just as the standard of the currency can be maintained only by outlawing coins below a certain weight and fineness. The ideal would undoubtedly be to have such rules self-imposed. To a certain extent, professional associations do establish standards. But it takes a long time to formulate them and much trouble to maintain them, and in most cases the only effective and practical measure, once granted the evil, is law. Self-help is clearly of no value where children are concerned, inasmuch as they have neither the physical nor the mental ability to organize for self-protection, and their only escape is to die young, as they did in the early days of the factory system.

But there are other evil incidents of technical progress not so generally recognized. New inventions not only introduce new dangers to life and health, they furnish new conveniences to criminals. Fire-arms, high explosives, improved drilling tools are familiar examples. The automobile has encouraged crime by furnishing the most

handy means both of reaching distant hunting grounds and of making a quick get-away. It also has become one of the common objects of theft, doubtless because it supplies its own transportation. The automobile accounts for a good real of the bold defiance of law by professional criminals.

Apart from mechanical inventions, our age has witnessed truly marvellous progress in business organization. Adam Smith thought that in his day there were only four kinds of business—banking, insurance, canals, and water-works—to which the principle of the joint-stock company was applicable without a monopoly grant. Today it has become almost the normal form of organization for every business from railroads and steel mills to lunch counters. Even families are now occasionally incorporated. Abuses have grown up in connection with the enormous power wielded by large corporations, and no method of checking them has as yet been devised excepting legislation. Many of these laws are still on trial, many of them have doubtless been ill-judged, but any fair-minded observer must concede that, in view of the great power developed by corporations, nothing but legislation could have imposed the checks which have curbed the abuses of that power. Many of those who now criticise the drastic and sometimes unwise provisions of such laws seem to have quite forgotten the abuses which led to them.

The progress of science is another active stimulus to social legislation, not only because it has introduced, with new power, new possibilities of abuse, but also because it has taught us the social reactions of things which were formerly supposed to concern only the individual. With beneficent anaesthetics like opium and cocaine, science has opened the door to demoralizing drug habits and necessitated laws against drug pedlars. With a wider knowledge of the causes of disease, things once thought innocuous are now known to be harmful both to the in-

dividual and to society. Laws are made for lead factories as the result of what science has taught us regarding lead poisoning. Engineering works are put under supervision on account of what science has taught us regarding the caisson disease. Anti-spitting rules and compulsory vaccination are more familiar examples of the same tendency.

Science discovered that the terrible disease known as "phossy jaw" was caused by the use of white or yellow phosphorus in the manufacture of matches. Science also discovered that by substituting sesqui-sulphide of phosphorus the process could be made innocuous to the workers, and that the lives of many children who were poisoned by putting matches in their mouths could be saved. But the sesqui-sulphide process cost a little more than the old process, and no single manufacturer could afford to use it unless his competitors used it. State law in such a situation would be of no avail, unless all of the states could be induced to pass an identical law on the subject, because it would be so very easy for the industry to move from states having strict laws about it to states having none. The end could be, and was ultimately, accomplished by imposing a federal tax on the use of white phosphorus to prevent its use, just as state bank notes have been driven out of circulation by the tax laid upon them. But the bill, though finally passed, met with the same fallacious arguments which are now so popular in other fields. We were told that it was paternalistic; that it was a usurpation of federal power; that it was a violation of personal liberty. It did, undoubtedly, violate personal liberty. It violated the liberty of the manufacturer to use the cheapest process he could find, but it safeguarded the liberty of girls in the shop to work without being exposed to a cruel and often fatal disease. It violated the liberty of the father to let his children play with poisonous matches, but it saved the liberty of the child to live. It gave a new duty to

the federal government, but there is not a state among the forty-eight that has been deprived of any power or privilege, or whose citizens are not benefited, by the passage of the law. Indeed, the reasons which induced our government to prohibit the use of poisonous phosphorus, had, long before the act of 1912 had been passed, led the principal match-producing nations of the world to unite by treaty in the suppression of phossy jaw, so that the problem was recognized as international. This example is cited to show how industrial hygiene and preventive medicine have proved the need of laws which would not have been understood, and which would have been generally resented half a century ago. They are still resented as a violation of personal rights by people who have not learned the reason for passing them.

The prohibition law is another case in point, and I make no apology for referring to it. Drunkenness was recognized as an evil as far back as the days of Noah, but was considered a matter for family or neighborhood control. The principal intoxicating drinks in Europe for many centuries were wine, or beer, and wine was commonly diluted with water. But science introduced the art of making distilled intoxicants of higher power and low price. In the early part of the eighteenth century London gin shops advertised that people might get drunk for a penny, and that clean straw in comfortable cellars would be provided for customers. This was a great boon for the individualist, but even Merry England saw that this kind of debauchery was not very useful to the wife and children of the drunkard, and passed the gin act of 1736. This statute, like many another, gave rise to riots and illicit trade, and was repealed after seven years. But other restrictive acts were passed in England and generally throughout the civilized world. In the nineteenth century the improved methods of business organization, the great joint-stock company, and the novel advertising technique gave a new power to the traffic in intoxicants.

Science had progressed in the meantime and taught us that most of the popular beliefs regarding the benefits to health of alcohol rest on an illusion, while in the economic field it was recognized as a powerful cause of waste, pauperism, and crime, and a serious handicap to production. These things were brought out more than a quarter of a century ago by the Committee of Fifty. Long before national prohibition had become a reality, the Brotherhood of Locomotive Engineers required total abstinence for its members in the public interest. Since that time, the speeding up of all traffic through the automobile, enhanced by the diffusion of wealth, which has brought the motor car within the reach of millions who never owned a horse, has increased the social menace, even of mild intoxication, a thousandfold. We cannot enjoy the automobile and have unrestricted drinking. Hence the United States is not the only country which has increased its restrictions. More severe laws have become almost universal.

Prohibition may be, and doubtless is, open to objections, but some tightening of the lid was bound to come as the inevitable consequence of technical and scientific progress. The act restricting the sale of alcoholic beverages in Quebec, the most "liberal" law of the kind in Canada, would have seemed impossibly drastic a few years ago. Only Bolshevik Russia has returned to the unrestricted use of vodka, after some years of inefficient effort at control, and celebrated the event, according to the press dispatches, by an orgy of drunkenness.

With the progress of science, we are bound to have more and more invasions of the liberty of the individual in the interest of the common weal. Some of the proposals may be unwisely framed. The machinery for executing them may be, and often is, inadequate. The laws may fail to take account of the indirect effects which almost always accompany any new regulation of life. But to ignore the reason for such laws merely reveals the ignorance of the objector.

Another cause of legislation lies in the increase of population, which is generally regarded as a sign of progress, but also creates new problems. There is no acute tenement-house question where each settler can get for the asking a farm of 160 acres and plant his house in the middle of it. It is the congestion of population in our cities which causes the housing problem and leads to laws specifying how tenement-houses shall be built, in order to provide for light, air, and safety against fires. It is the general growth in population which has involved the threatened exhaustion of our lumber supply, and necessitated laws providing for increased protection against forest fires, and for re-forestation in the interest of future generations. The whole conservation movement, with the legislation that accompanies it, is the result in the main of an increase in population.

The popular diffusion of wealth which has been so remarkable in our country, involving high wages, short working hours, and more leisure for the masses, also creates new problems. Traffic on the highways is a very different thing in these days of "Fords" and "Stars" from what it was in the equine era or even in the early automobile era. The increase and diffusion of wealth have put a wonderfully convenient but dangerous machine into the hands of a growing number of young and inexperienced people, to say nothing of criminals and degenerates, who endanger the safety of others unless restrained. The surplus revenue enjoyed by many offers a new temptation to swindling schemes, and requires laws against fraudulent stock promotions. Legislation is the price which we pay for our greater wealth.

This cursory review shows that the innovations, fundamental and unprecedented, which constitute modern progress, such as technical improvements, business organization, scientific discovery, the increase in population, and the diffusion of wealth, to mention but a few examples, inevitably create new problems with which the

old laws were unable to cope, and call for new regulations in order to secure their enjoyment by the people as a whole. Unless we recognize this basic fact, we cannot discuss legislation with intelligence. If mankind had the wisdom to develop and enforce social inhibitions to prevent these abuses, legislation would be unnecessary. But mankind has never had, and probably never will show, such foresight. In many cases, the mass of the people are not aware of the evils until instructed by others, and even if they know them, there is no time for new social habits to form. So rapidly do inventions and discoveries crowd upon us that "manners" cannot keep pace with them. Public opinion itself, as far as it is articulate, is strongly influenced by great commercial interests which can carry on an active propaganda either for or against a certain measure through straight advertising, through the press, the movies, and even the radio. Constant reiteration plants a false idea in the minds of people who have no ability to look up the facts for themselves. History itself has been distorted by this kind of publicity. The mere omission of an important piece of information may be used by those interested to influence public opinion. We had a striking illustration of this at the time of the meeting of the World's Woman's Christian Temperance Union in Scotland in the summer of 1925, when those who controlled the radio refused to broadcast the speeches of the President, Miss Gordon, and Lady Astor, unless they would eliminate all reference to prohibition.

Even when people are aware of an evil, united and voluntary action is almost impossible. This is shown in the history of the Consumers' League. When that society was formed, it had what seemed a rational and practical programme. The evils of long hours and unsanitary conditions in the work of women and children were recognized, and made a strong appeal to the sympathies, especially of women. It seemed natural to sup-

pose, therefore, that if women as purchasers would insist on buying only things which were made under good sanitary conditions, the pressure of public opinion would remove the evil through the simple operation of the oft-invoked law of supply and demand. But it did not, and the Consumers' League has found by actual trial that only legislation will get results. This experience has all the value of a laboratory experiment to show the difficulty of controlling widespread social evils by voluntary action.

What has been said refers mainly to legislation in the public interest, or what is commonly called social legislation, because that is the kind which is today most frequently attacked. Nothing has been said regarding the vast amount of legislation which has a purely commercial motive, and which is intended to line the pockets of those who promote it. Nor has much been said regarding the extent to which many of the abuses which need correction are themselves the outcome of this kind of legislation. In fact, much of what we call "progress" has been promoted by laws which aimed only at increasing production and profits, but ignored the social evils which followed. Our protective tariff was deliberately intended, in the words of Hamilton, to give employment to children "of tender age." The development of our railroads, with the abuses of power which led to state and federal regulation, was made possible only by legalizing joint-stock companies with limited liability and the power of eminent domain. Our great combinations popularly called "trusts" could not have existed without state laws directly and deliberately encouraging them, but doing little or nothing to control them.

To one who has studied social and economic history realistically and who has been trained in the careful verification and interpretation of facts, much of the current discussion of legislation has a singularly unreal and archaic sound. Instead of evidence, we are treated to

catchwords and question-begging epithets. People who have every reason to maintain respect for law for the protection of their own property rights are willing, under the irritation of some law which they dislike, to indulge in wholesale denunciation of law-makers as a class and give aid and comfort to criminals. Even men of high academic standing are not above throwing out sweeping expressions of opinion as if they were facts and giving us slogans for arguments.

The most over-worked of all of these slogans at present is "liberty." Let us stop a moment to see what that word means. Obviously it means absence of restraint. It is, therefore, a negative, abstract term. It is so abstract that, unless qualified, it means nothing. At a given time and place such a qualification is often added by implication. To most of the early Puritans, liberty meant freedom to worship God according to their consciences. To some of their descendants it means freedom to buy a cocktail. In fact, there may be as many different kinds of liberty as there are possible restraints to be negatived. There is physical liberty or freedom from the restraints of disease and physical weakness. A cripple or an invalid is not physically free. There is mental and moral liberty or freedom from the inhibitions of ignorance and habit. The illiterate man is not free in a reading and writing society. The slave to a drug habit is not really free, because his will power is fettered. There is economic liberty or freedom from the restraints of poverty which prevent a man from entering the market as a real competitor for goods or wages. In short, like the spirits which set the swine of Gadara rushing down a steep place into the sea, our liberties are legion, and legal liberty or freedom from the restraints of government is only one of them. Yet it is the one which is usually singled out for discussion, as if it were the only one.

Now, many of our legal restraints on liberty are imposed solely because they make other forms of liberty possible. Physical liberty has been promoted by compulsory vaccination laws which have nearly eliminated what was once a scourage of humanity, yet are still criticised by many. Mental liberty has been promoted by compulsory education laws which have forced parents to send their children to school. Economic liberty has been promoted by labor laws which make the wage-receiver more efficient and prevent the stunting of his growth and strength by over-work in childhood or in unsanitary surroundings.

The test, then, of every law which restricts personal liberty is this: Does it make for liberty in the larger and real sense? This test can only be applied by a careful study of the facts. To try to discredit a proposed law by resorting to phrases and catchwords is simply to muddy the stream of thought and to give us heat when we need light. It is a mere platitude to condemn a law because it infringes personal liberty. There are few laws which do not. Yet many people repeat this objection to laws which they dislike with as much confidence as if they had uttered an idea, when they have only expressed an emotion.

We are supposed to live in the age of science, but those who apply the methods of science are a small minority. When public questions are concerned, opinion is still swayed by political doctrines. As William G. Sumner said twenty years ago:

> Doctrines are the most frightful tyrants to which men are ever subject, because doctrines get inside a man's own reason and betray him against himself. The people acquiesce in the doctrine and applaud it because they hear the politicians and editors repeat it, and the politicians and editors repeat it because they think it is popular. So it grows.

Some doctrines have become a veritable fetish. Writers who would look upon human sacrifices as bar-

barous are quite willing to sacrifice the lives and health of women and children to the cult of a political doctrine. So obsessed are they with the evils of excessive legislation that they overlook the greater evils of corrupt and ineffective enforcement.

Many doctrines come to be used in a sense quite foreign to the ideas of those who originated them. "Laissez faire" was in the early days the watchword of those who favored progress in opposition to vested interests. At present it has its most vociferous disciples among the spokesmen of the vested interests that, having profited by the legislation of the past, now say, "hands off." The modern liberal is often liberal only to himself. He is sometimes a conservative motoring under last year's number plate. His party name, like the gaudy labels which cover his baggage on his return from his annual trips to Europe, records, not the place to which he is going, but the places which he has left behind. What is proclaimed as the faith of a liberal often looks, when applied, like the creed of a tory.

Liberty, especially personal liberty, makes a strong appeal to all of us, because we are all selfish, and the term personal liberty means to each of us the liberty to do what suits his personal tastes. But our Constitution was not adopted to secure absolute liberty. With the felicity of diction which marks this wonderful document it aims to secure "the blessings of liberty." If liberty is to be a blessing and not a curse, it must be a liberty which subserves, not the crude egotism of the individual, but the "general welfare." It must be a liberty promoting civilized progress under the restraints of law.

# PART II

# ADMINISTRATION OF LAW

## LAWYER'S RELATION TO LAWLESSNESS[1]

To all supporters of law and order, to all admirers of stable government, and to all truly patriotic Americans, there is cause for keen regret in the extent of lawlessness in the United States and in its apparent increase.

Lawlessness, of which much is written, and much more thought, has manifested itself in many ways other than open outbreaks and violence. These outbreaks are merely the occasional expression of a mental attitude. Open violation of law and overt subversion of it, except in readily recognizable cases of crimes of passion, generally do not occur until the minds of the parties violating the law and being guilty of lawlessness have become imbued with disregard of, and contempt for, law and its enforcement. Furthermore, such acts will not be tolerated by the public unless that public has in turn arrived at that mental condition where its respect for law is not profound. I must confess my inability to determine in my own mind any fixed opinion as to whether our American lawlessness is due to a disregard for law as a basic rule of conduct, for certain phases thereof, or for the existing forms of procedure for enforcement of law. If it be the two latter, the case is far from hopeless, and instead of causing despondency, needs only amendment of the offending forms, removal of the cause, and activity in enforcement of the amended forms. If

[1] From article by Percy Bell, Greenville, Miss. *American Law Review.* 48:209-15. March, 1914.

it be the first then the condition is serious indeed. I am inclined to the opinion that it is more the last, more a disregard and contempt for the methods of administration and the instrumentalities of law enforcement than for the law itself, but the transition is one that can be made with comparative ease. It is not a far cry from contempt for legal forms and existing methods of enforcing law to contempt and disregard for the law itself, nor is it difficult for the public to confuse the two. For this reason it behooves good citizens to search as far as possible for the causes underlying lawlessness, and endeavor to correct the condition.

It is not my purpose to attempt here to discuss the underlying causes of lawlessness; this is much too large a problem for the limits of this paper. I shall endeavor to consider briefly but one of the many related problems, the one which most intimately concerns and touches our profession; viz. the lawyer's relation thereto.

Before entering upon this, I would, however, glance hastily at some of the causes which are generally assigned for American lawlessness. It is frequently alleged that we are a lawless people because we live in a new country; that we have not yet had time as a people to find ourselves; that the development of new territory and a pronounced individuality, attributed to the necessity for grappling with and solving problems unaided, has caused each man to be a law unto himself in the clearing of new lands and meeting with new conditions which involved to a considerable degree the isolation of the individual and his removal or separation from the established courts of law. I think this explanation with its different exegetical branches is misleading. While all the premises are true, the conclusion does not necessarily follow. Canada is a new country and even more sparsely settled than we are now, or have been for many years; so too are South Africa and Australia, yet we do not find similar lawlessness in any of them. There is in all

of them a greater respect for law, and better observance of it, than we enjoy.

Another explanation given is that we are a mixed people; that the various colonies and dependencies of the various powers are more homogenous, and have transplanted their native law and love of law with them; that they are a people who observe their former customs because they are an unmixed people. This also I think is misleading because there is no valid reason why the American people, the component elements of which are law abiding in their origin, should be less law abiding than any one of its original constituent elements.

It cannot be that we have not enough statutes, because the number of American statutes ground out by Congress and state legislatures is proverbial; nor can our lawlessness be attributed to an insufficiency of officials, or courts, for we have an abundance of both. I would suggest that while there is a certain influence attributable to all of these enumerated causes, even more can be attributed to the fact that our country has experienced an amazing development in wealth which has had a double effect: first that of lowering and commercializing our ideals; second, that of making financial success the standard under our false and vicious system of distribution, which concentrates the greater part of our wealth in the hands of comparatively few, to the discontent of the many, and the demoralization of the few. This has produced a national unrest, manifesting itself in various forms of socialism, in a general belief in the power of wealth and a widespread, general discontent with established methods, customs, and laws which encourage such social and financial conditions.

The result and effect is the non-enforcement of many of the laws of which we have an abundant variety, and their mal-administration and perversion. The non-enforcement and perversion in turn are the source of further discontent and cause still greater laxity of en-

forcement and more flagrant perversions. Non-enforcement is largely attributable, of course, to public opinion and its unwillingness to enforce the law; this unwillingness having originated probably in a decided and popular objection to certain laws which were deemed unjust and being greatly extended by habit and dislike for an extreme formalism of proceedure in the enforcement of those provisions which abstractly meet with popular approval.

No stream flows evenly or smoothly through impeded channels. The channels of administration of American law are fearfully clogged and impeded by an antiquated procedure, which at best would be extremely obnoxious, always fruitful of delay and frequently dangerous, but which is made more so by the advantages taken of it by the unscrupulous.

Before going further I wish to state that I would not be understood as being a pessimist, or undertaking any Cassandra-like role. On the contrary, I am an optimist and believe that our lawlessness is curable and our profession fitted for the curative work which the public has the right to demand of it. No man has a higher respect or greater admiration for the profession of law than I have. No man hopes more for it, or is prouder of being a member of it. It is possible that on the admiration which I entertain for the profession I found my belief that in the hands of the bar is very largely to be found the means of alleviating national conditions, elevating national standards and increasing public respect for law and the courts. The profession has governed this country for many years; it has had the framing of the laws as well as their execution delegated to it and upon it rests a tremendous responsibility for the improvement of existing conditions.

The lawyer's relation to lawlessness is as I conceive it, two-fold, first as a causer or producer of lawlessness, second, as a preventer, restrainer or curer. The first

phase is unfortunate and deplorable. It is somewhat attributable to the fact that the profession of law has been open to all on comparatively easy terms, and necessarily has been entered by a number whose ethical standards are not desirable, whose greed outweighs their scruples.

As a producer or causer of lawlessness, a lawyer is frequently active; sometimes only negative in his influence by failure to oppose or refusal to improve evil conditions. His activity may assume any one of a number of varying forms. Of course, for the fomenter of strife and litigation, for the active and unscrupulous counselor of lawbreaking, the profession, as well as the public, has a most profound contempt. Nevertheless such lawyers exist, and their influence in lowering the tone of the profession, in decreasing public respect for it, cannot be overestimated. Besides these unscrupulous and disreputable members, we have in our profession men, who by reason of their tremendous responsibilities, their vast opportunities for superficially respectable nefariousness, their prominence before the public, their astounding fees and emoluments occupy a relatively high and somewhat enviable position in the profession, although it is doubtful if they are not more productive of lawlessness than the class heretofore adverted to. This class is found almost exclusively in the great cities, especially those of the East where gigantic corporate interests have their habitat. Their influence is greater by reason of their prominence.

For example, our country is ridden with trusts, many of them declared illegal by the courts, many of them organized in open defiance and violation of the law; among the latter, those railroad companies controlling coal mines; all of them active law-breakers, attacked as such by the government but whose dissolution has been effected only after tremendous expense and protracted effort. Yet each and every one of these was organized

only by the aid of lawyers standing high in their profession; none of them could have existed for a moment without its legal staff. No railroad is wrecked, its small stockholders crowded out, and the profits divided among a gang of plunderers, unless a lawyer and a very shrewd and highly paid one, superintends and directs the operation. Your modern buccaneer while entirely willing to violate law is very careful to observe so far as possible the forms of law and to preserve the appearance of respectability. For this reason he retains highly intelligent counsel.

I must confess that I am unable to perceive the moral difference between the lawyer who knowingly accepts a part of the spoils that his burglar client has stolen as a payment of his fee for defending that client, and the lawyer who takes a part of the stock of a wrecked railroad from the conspirators whom he has directed. I am similarly unable to discover any moral difference between the lawyer in the cities who is retained permanently by a gang of criminals to be of service in the event of their detection and apprehension, and the lawyer who organizes an illegal combination and is retained by it to direct it along the devious ways of plundering under forms of law. If there be any difference, it is in favor of the smaller offender whose opportunities for enlightenment were probably not so good, and who does not add hypocrisy to his other shortcomings. The lawyer who pursues this course is one of the creators of that public sentiment which today openly announces that if a man has sufficient money he cannot be punished for crime. Erroneous the sentiment may be, but existent it certainly is, and those entertaining it are well along the road to a contempt for law and lawyers. They are confirmed in their opinion by the high standing, socially, professionally and financially, of the men whose best talents are frequently used to defeat the ends of law and justice.

A mooted question among lawyers is as to the propriety of defending a criminal whom one knows to be guilty. Personally, I refuse to do it. Yet, I recognize the fact that that many lawyers and conscientious ones at that, will accept employment of this kind because they believe that it is the duty of a lawyer to accept employment from every client who needs representation. It is not so much, however, the mere fact of representation that brings about discredit to our profession and contempt for law by the public, but the manner in which that representation is performed. Few countries have suffered more humiliating or disgraceful spectacles than did the United States when Charles J. Guiteau was defended for the murder of President Garfield. Every trick of the criminal lawyer, every petty objection, every plea for delay, every possible dilatory tactic was used by his counsel. Contrast this with the representation of Czolgosz when on trial for the murder of President McKinley. His legal rights were protected, his counsel saw that he had a fair trial, that no incompetent testimony was introduced; the consequence was that in an expeditious but decent, orderly manner he was tried and punished for his crime.

These two cases are as good exemplifications as I should desire of the point that I am endeavoring to make, viz., that the manner of defending a known criminal is productive of respect or disrespect for law and lawyers according to whether it is the manner of the lawyer or the pettifogger. If there is any doubt in the mind of anyone that all possible technicalities need not be taken advantage of, and that a criminal hearing can be expedited when necessary, or delayed when desired, let him contrast the course of the same lawyer when defending for a fee, and when he is appointed by the court to defend a pauper criminal.

That the public idea of the immunity of wealth, and the purchasing power of money is not exaggerated by me,

let each of you bear witness by considering his own experience observation. While we know of it, yet we may not all have had it so strikingly borne in upon us as did an acquaintance of mine who one day received a letter from a friend and client, reading about as follows:

Dear ————

I have had a quarrel with ———— and am writing to know what you will charge to clear me, if I kill him. Please make it as reasonable as possible, because times are hard and crops poor.

## DENIAL OF JUSTICE[2]

The realization that there are grave defects in the administration of justice came but slowly. Had not enough laws been passed, enough courts organized, court houses built, judges, clerks, and officers provided and paid salaries—what more was necessary? When Roscoe Pound delivered his epoch-making address on *The Causes of Popular Dissatisfaction with the Administration of Justice* before the American Bar Association in 1906, his was like a voice crying in the wilderness. From the reported discussion, one would judge that most of the lawyers present were incredulous, and that not a few were indignant at the intimation that our justice was not closely akin to perfection itself.

In the twelve years that have followed, the evidence has become overwhelming. The facts, though not the causes which underlie them, are well known. The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.

[2] Smith, Reginald H. Justice and the Poor. *Carnegie Foundation for the Advancement of Teaching. Bulletin* no. 13. p. 7-12. New York. 1919.

Sweeping as this indictment may appear, it is substantiated by ample authority. A few statements deserve to be presented here.

If there is one sad anomaly that should stand out in our present days of conscientious self-searching, it is the harsh fact that, with all our prating about justice, we deliberately withhold it from the thousands who are too poor to pay for it.[3]

The sources from which industrial unrest springs are: . . . 3. Denial of justice in the creation, in the adjudication and in the administration of law.[4]

The equal administration of the laws is a right guaranteed by the fundamental law of the land; and yet no person will deny that this privilege is more honored in the breach than in the observance; for there are very many people in every American community who, through ignorance of their rights or their inability to pay the imposts levied by the state as a condition precedent to the pursuit of justice in the courts, are constantly being denied that equal administration of the laws and the justice that is supposed, logically, to follow it.[5]

Taking the country as a whole it is so obvious that we have almost ceased to remark it, that in petty causes, that is, with respect to the every day rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed. Indeed in a measure this is so in all causes. But what is merely exasperating in large causes is downright prohibitive in small causes. While in theory we have a perfect equality, in result, unless one can afford expensive and time-consuming litigation, he must constantly forego undoubted rights, to which in form the rules of law give full security but for which, except where large sums are involved, the actual conduct of litigation affords no practicable remedy.

Many causes have contributed to this neglect which disgraces American justice.[6]

The majority of our judges and lawyers view this situation with indifference. They fail to see behind this denial of justice the suffering and tragedy which it causes, the havoc it plays in individual lives, and its influence in retarding our Americanization program. "The judicial department," said Chief Justice Marshall, "comes home in

[3] American Judicature Society. Bulletin. 8:24. 1915.
[4] Summary of the Manly Report of the United States Commission on Industrial Relations. 1915, p. 5, 9.
[5] San Francisco Recorder. p. 1. November 6, 1916.
[6] Harvard Law Review. 26:316. 1913. Administration of Justice in the Modern City. Roscoe Pound.

its effects to every man's fireside. It passes on his property, his reputation, his life, his all." Because law is all-embracing, the denial of its protection means the destruction of homes through illegal foreclosures, the loss through trick or chicanery of a lifetime's savings, the taking away of children from their parents by fraudulent guardianship proceedings. Hundreds of thousands of men, many of them immigrants, have been unable to collect their wages honestly earned.

Denial of justice is not merely negative in effect; it actively encourages fraud and dishonesty. Unscrupulous employers, seeing the inability of wage-earners to enforce payments, have deliberately hired men without the slightest intention of paying them. Some of these employers are themselves poor men, who strive in this way to gain an advantage. The evil is not one of class in the sense that it gives the poor over to the mercies of only the rich. It enables the poor to rob one another; it permits the shrewd immigrant of a few years' residence to defraud his more recently arrived countrymen. The line of cleavage which it follows and accentuates is that between the dishonest and the honest. Everywhere it abets the unscrupulous, the crafty, and the vicious in their ceaseless plans for exploiting their less intelligent and less fortunate fellows. The system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever invented.

The law itself becomes the means of extortion. As Lord Brougham said of the English administration of justice in 1800, it puts "a two-edged sword in the hands of craft and oppression." From the cradle to the grave the poor man is the prey of a host of petty swindlers, who find it easy, through such devices as fraudulent assignments, trustee process, or garnishment of wages for fictitious debts, to rob and despoil. There exist to-day

businesses established, conducted, and flourishing on the principle that as against the poor the law can be violated with impunity because redress is beyond their reach. It is this situation which allowed such unrestrained abuse of the laws regulating the assignment of future wages that a sort of quasi-slavery resulted, which brought the loan shark into being, and permitted flagrant usury to grow into a monstrous thing.

The effects of this denial of justice are far reaching. Nothing rankles more in the human heart than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them. A persuasion spreads that there is one law for the rich and another for the poor.

How this comes about can be simply told. One afternoon, Arthur V. Briesen, President of the New York Legal Aid Society, took Theodore Roosevelt, then Police Commissioner of New York, to the Society's office to see what went on. They sat at the interviewing desk. A glazier came in and related that he had set twenty-two panes of glass in a barn and that the owner of the barn had refused to pay him $6.60, the agreed price. He had been out of work and needed this money to buy bread and milk for his family's supper. On his way home from the West Side, where he had worked, to the East Side, where he lived, he crossed Fifth Avenue at Forty-fourth Street and passed the luxurious restaurants on either corner. His own children went to bed supperless. The next morning he sought out a lawyer, who told him that

to bring suit the costs and the fee would be ten dollars. This he could not pay. From there he went to the Municipal Court, originally known as "The Poor Man's Court," where he saw a judge, who was obliged to explain that he had neither the time, nor the money, nor the right to undertake the necessary proceedings; that as the man had no money, he could not prosecute the case; and that, inasmuch as the expenses would exceed the amount in dispute, he had better drop it. As the man told his story, sitting in the office of the legal aid society, he was an incipient anarchist.

The effect on the immigrant is peculiarly unfortunate. He comes to this country, often from lands of injustice and oppression, with high hopes, expecting to receive fair play and square dealing. It is essential that he be assimilated and taught respect for our institutions. Because of the strangeness of all his surroundings, his ignorance of our language and our customs, often because of his simple faith in the America of which he has heard, he becomes an easy prey. When he finds himself wronged or betrayed, keen disappointment is added to the sense of injustice. Through bitter disillusionment he becomes easily subject to the influences of sedition and disorder.

The essentially conservative bench and bar will vehemently deny any suggestion that there is no law for the poor, but, as the legal aid societies know, such is the belief today of a multitude of humble, entirely honest people, and in the light of their experience it appears as the simple truth. Consider, for example, this actual case. A woman borrowed ten dollars in 1914, and for two years paid interest at 180 per cent. In 1916 a law was enacted fixing 36 per cent as the maximum rate. The lender, by a device contrary to the statute, compelled her to continue paying 156 per cent interest. The law also provided that if excess interest were charged, the loan would be declared void by a suit in equity. The law was on the

books. The court house was open, the equity court in session with its judge on the bench and its officers in attendance. All that was of no avail to her for the law could not bring redress until five dollars was paid for service of process and entry fee, and ten dollars to an attorney to draw, file, and present the necessary bill of complaint. Fifteen dollars she did not have and, because of her condition, could not earn. For her there was no law.

Repeated warnings have come from sources entitled to respect that such a condition of affairs is capable of producing incalculable harm.

"When litigation is too costly, the result for many persons is a denial of justice. Such denial or partial denial of justice engenders social and commercial friction. The sense of helplessness thus caused incites citizens to take the law into their own hands. It causes crimes of violence. It saps patriotism and destroys civic pride. It arouses class jealousies and breeds contempt for law and government."

"The problem is fundamental. It strikes at the very root of our economic, social and political structure. The man or woman who has honestly toiled and cannot obtain the wages earned, loses faith in humanity and the efficacy of our laws and courts; is often turned out a beggar, vagrant or criminal, or seeks redress by forcible means.

If ever a time shall come when in this city only the rich man can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the court room, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the hands of men, and they will almost be justified in the revolution which will follow."

In that direction we have imperceptably, unconsciously, and unintentionally drifted. The echo of such a course is disclosed by history.

Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes in the law itself. And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end.

## PERSONAL LIBERTY[1]

It seems to be the natural tendency of things that governments are continually reaching out, trying to get more power, and that the more power they get, the less liberty the individual has. That has been the history of all governments which have preceded us, and you can trace the downfall of all the despotic governments of the world to the fact that the citizens were deprived of their liberty; and special edicts had sprung up in those old countries, taking away the equal privilege and the equal right the individual had. You know as well as I do, that the conflict between the patrician and the plebeian in Rome occasioned the downfall of the Roman Empire. Those of you who have read Gibbon and other histories of Rome, know that to be the fact. The conditions existing in Rome before the beginning of its downfall, as I shall attempt to show you before I get through, in my opinion were not one whit worse than exist in the American cities today.

When our government was formed, it was intended and formed for the purpose of protecting what we are pleased to term *"inalienable rights,"*—that is, rights which even the law cannot take from us, and which are designated in the Declaration of Independence as natural or *God-given rights.* "We hold these truths to be self-evident, that all men are created equal; that they are endowed *by their Creator* with certain *inalienable rights.*" Not rights given by any government, but rights that cannot be transferred even by law,—with which you are endowed by your Creator—*inalienable rights.* What are those rights? "Among those rights are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Whether you

[1] From address by Judge Thomas B. Buckner at Kansas City, Mo., April 1, 1924, before the younger members of the Kansas City Bar. *American Law Review.* 58:781-94. September, 1924.

young men had thought of it in that connection or not, it is true that all the law we have in our Constitution and in our law books what you read, in so far as it applies to this subject, was enacted for the purpose of preserving intact to the people of the country those *God-given inalienable rights,* that every man has the right to live, he has the right to have life, the right to liberty and the right to pursue his own business, and no law can take it from him. Any law or statute which seeks to take away those natural rights is violative of the fundamental principles upon which your government is founded. Other things are merely corollary or collateral to that. But we were not satisfied with that Declaration of Independence, and, when we came to adopt our Constitution, certain provisions were placed in that Constitution preserving the liberty and the life, and the business of people, that were even established at that time by the common law of England. Realizing what a great struggle England had made to get rid of those tyrannies, we placed certain provisions in our Constitution, although at that time we adopted the common law of England. Among them was the writ of habeas corpus. For a long, long time, the writ of habeas corpus was absolutely suspended in England. And we get that, you will remember, in the Magna Charta forced from King John on the plain of Runnymede; and, when we achieved our independence, we provided in our Constitution that the writ of habeas corpus was never to be suspended except in case of war or public danger. The Constitution of the State of Missouri provides that the writ of habeas corpus *shall never be suspended under any circumstances whatever.* The practice had grown up in England of issuing nameless warrants, search warrants, by the minister of justice. They did not do like some do in Kansas City—here in Kansas City they do not wait for a warrant of any kind, but go and arrest without a warrant, and imprison without commitment. There the minister would issue the warrants, give them to an officer to

serve. The officer would serve them, and then would lock them up, and the writ of habeas corpus was suspended, and they could not get out. But the officer, even in those times, did not have any right to arrest without warrant. And, going back to the darkest days before the French Revolution, the gendarme or policeman never thought he could go and arrest anybody and lock him up at will, without some legal process. The principle obtained in England, of the nameless warrant or blank warrant, for a long time, until the matter came before Lord Camden in 1762; and that great justice, in commenting upon these nameless warrants, announced this principle:

> To enter a man's house, by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition —a law under which no Englishman would wish to live one hour.

After Lord Camden's decision, the English government passed a law abolishing the nameless or blank warrant, and adopted one similar to that which we have.

The question of the unreasonable search and seizure is covered by that provision of the Constitution which guarantees that no place shall be searched and no person shall be seized except upon affidavit, upon satisfactory evidence, and signed by an officer, authorizing and particularly describing the place to be searched and the person or thing to be seized. Commenting upon that search and seizure provision, Justice Bradley of the Supreme Court of the United States, in the case of Boyd v. United States, referring to Lord Camden's decision, said:

> The law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered one of the *landmarks of English liberty*. It was welcomed and applauded by the lovers of liberty in the Colonies as well as in the mother country.

Some four years after Lord Camden's decision, when the resolution was being discussed before the House of Commons, condemning the unlawful searches and seizures, Lord Chatham said:

> Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut, the wind may whistle around it, the rain may enter it, but the king cannot.

Before Lord Camden's decision, however, as early as February, 1761, James Otis, a celebrated lawyer of that day, a native of Massachusetts, who was at that time attorney for the Crown at Boston, declined to prosecute the persons arrested under such nameless or blank warrants. In order to discover some literature of a rebellious nature, the nameless warrants were being issued in Boston, Massachusetts, by the agents of Great Britain. Under those nameless warrants, certain citizens of Boston were arrested, and, if James Otis had retained his position as counsel for the Crown, it would have been his duty to try to uphold those nameless warrants; but, rather than do that, he resigned his office as attorney for the Crown, and volunteered his services to defend those who had been arrested upon that kind of a search warrant, and whose property had been invaded; and, although offered a large fee to represent them, he said: "In such a cause as this I despise a fee." And the great speech which he made upon that occasion, in opposition to those kinds of warrants, occupies a prominent place in American history.

John Adams, in speaking of the causes which brought on the Revolution, and commenting on the great speech of Otis, said:

> Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.

Now, the principle of search and seizure is still provided for not only in the common law, but its violation is guarded against in our Constitution. However, it is being openly violated every day. I like to think of the home. To make the right kind of a home is the most important service which can be rendered by either church or the state. Make it a happy place, where joy, love and peace

reign; protect it sacredly from invasion, and you have done something worth while. The home is regarded by law with a favor commensurate with its importance. The Constitution of our country provides "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

But, what is the fact, right here in Kansas City? A short time ago, one of the members of our profession, represented one Dr. Uhls, who was alleged to have committed some crime out in Hutchinson, Kansas. The Kansas officials come here. They want to find Dr. Uhls. They go down to the City Hall, to the police department, and the police say: "We will find him for you; this man McClintock is his attorney; we will get him and sweat him." They go out to his house, at eight o'clock at night. McClintock knew Ingram Hook, Police Commissioner, with whom he had some business a few days before. They said "Mr. Ingram Hook wants to see you. Will you please come to his office?"—misrepresenting the facts in order to get him away from his home. There was no warrant to take him away, but, as soon as the police get him in their car, they take him down to an obscure station, in the West Bottoms of this great city, and keep him there incommunicado; and, by some chance, about three o'clock in the morning, McClintock communicates with some friends. A writ of habeas corpus was obtained, and under that beneficent writ, which is for the purpose of relieving from oppression, he is turned loose. That man was taken from his home without warrant, without any information, simply upon the orders of a policeman, and deprived of his liberty for the purpose of trying to *extort* from him information which our law provides he does not have to give—i. e., confidential com-

munication between attorney and client, which has always been privileged. That is the law. I am not simply speaking of Kansas City—but I am conversant with these matters, because many of them have come before me. I shall not take the time to mention the outrages; but lest there may be some present who think there is "politics in it," I assure you I use these examples as an illustration to my argument. The same thing obtains in other large cities of the country. It is one of the worst signs of the times. Personal liberty is being overridden everywhere, in the face of the plain language of the Constitution. Some years ago, Judge William J. Gaynor, who was Judge of the Supreme Court of New York, afterwards Mayor of that great city, wrote a letter upon this subject, in which the American policeman was described as a Russian czar —and it is true.

If any elected judicial officers were to one moment attempt to exercise this arbitrary power, to arrest and imprison without warrant or to cause raids without warrant, they would justly be denounced as tyrants and oppressors and be the subjects of impeachment.

The greatest lawyer and writer upon this provision of the Constitution, relating to unreasonable search and seizure, or unlawful search, to my mind, is that great lawyer and judge, Thomas M. Cooley. If you will take his work on Constitutional Limitations, and read what he has to say about unlawful search and seizure, you will find that he closes his chapter with his statement, which is the law —that the doctrine still obtains in this country now, under our Constitution, that nobody can go in the home except he go clothed with a proper warrant obtained in the proper way from a proper official. And that, if anybody seeks to come into your house or your place of business, without your consent, and without being clothed with a proper warrant, he lays down the rule that you have the same right to defend your house as you have to defend your life, and that you can call to your aid your servants,

your guests and others, and to shoot down the intruder, and be as much protected in that right as if you shot anyone in the defense of your own person. This is the law today. Yet, gentlemen, what is the condition here? Scarcely a week passes that we do not hear something about a "raid" being made on some place of business. I undertake to tell you gentlemen that, in the whole range of constitutional law, you will not find in a single lawbook where the term "raid" has been even cited or upheld as being the right of any officer to make. In the face of that provision of the Constitution which guarantees the right of free speech—if a lot of people get together and talk upon some subject that someone thinks is inimical to the government, it is a great thing to go and raid them, and take them down to the police station without any warrant—many of them poor people who cannot defend themselves and who do not know their rights, and whose rights are being overridden every day in the week. And I do say to you gentlemen that the police department of our great cities do arrest people without process of law, in face of that provision of the Constitution which provides that no man shall be deprived of his life or liberty without due process of law, and are guilty of the invasion of homes without any warrant whatever, and they break up furniture and things of that kind, with axes, and are also guilty of the invasion of private clubs and breaking them up, and the invasion of societies, where the members thereof have met together to talk and express themselves upon public questions. Such practices, gentlemen, are breeding enemies of your government every day. Classes and schools of those who have been thus oppressed are being educated as enemies of government and turned loose, haters of so-called government instead of being friends to the government. These practices are making Reds every day in the week. Some day the "worm will turn."

These poor people you do not hear anything about, but I see them in connection with the numerous writs of habeas corpus that I have to issue, and I dare say that nine out of ten of them have been arrested under czar-like methods—i. e., at will, without warrant or information, imprisoned without any lawful commitment, and kept in prison as long as they will, and in addition tortured in an effort to get them to make confessions, and this, too, in the face of the constitutional provision which says that "no man shall be compelled to be a witness against himself." Also, they hold the prisoners incommunicado, not even allowing them to see their friends, much less employ counsel, in the face of the constitutional guaranty that every man charged with a crime is entitled to counsel, and, if he cannot employ counsel, it becomes the duty of the court to employ counsel for him. They lock them up and hold them without bail, in the face of the Constitutional provision guaranteeing these personal rights, and that every crime, except murder and treason, is bailable, and even murder, unless the proof is evident and the presumption great. Yet, these petty tyrants seek to and do oftentimes prevent anyone from giving bail, and if, perchance they do allow bail they purposely fix it so high that the arrested person cannot give it, and the helpless prisoner has to languish in jail—in the face of the Constitutional provision that unreasonable bail shall not be required. Yet, the press of this city has recently criticised the Supreme Court of your state because, under the stress of circumstances, the bail has been so high that it was thought to be unreasonable, and the Supreme Court reduced the bail numerous times. Yes, they seek to criticize your court, although it is expressly stated in the Constitution that excessive bail shall not be required. To require excessive bail is as much a violation of the Constitution as to refuse to allow bail at all. Right down here in your police station, here in this

great and beautiful Kansas City, of which we all feel so proud, in cases that have come before me, the police, for a simple misdemeanor, have demanded bail for as much as five thousand dollars, in face of the positive statute, and positive ordinance of the City, which say that they have no authority to exact bail in such cases in excess of one thousand dollars. And yet, I have had to discharge prisoners under the writ of habeas corpus, because there they were demanding bail in the sum of five thousand dollars, for the simple violation of a city ordinance. So it runs along—all of those provisions of the Constitution which are put in there for the purpose of protecting and safeguarding those God-given, inalienable rights, "life, liberty and the pursuit of happiness"—that provision which says that no person shall be deprived of "life, liberty or property except by due process of law." Amendment 14 was adopted in addition, further providing that *no state shall pass any law which will deprive any person of his life, liberty or property without due process of law.* There is that inhibition against a state from passing laws of that kind. This amendment 4, which I have been discussing, regarding unreasonable search and seizure, was put there for the protection of the individual. We have also the provision that every person is entitled to the benefit of counsel, and, if unable to employ counsel, the court shall appoint counsel for him. Also the further provision that no man shall be compelled to incriminate himself or to be a witness against himself is in the Constitution. But what is the situation here and in other cities regarding that? No man shall be compelled to incriminate himself or to be a witness against himself. But it is nothing unusual in this city at this time for a crime of some kind to be committed, and twenty to fifty persons will be arrested at one time and taken down to the holdover and locked up, and one after another of them grilled and tortured—tortured in some instances worse than any torture that ever occurred

during the darkest days of the Spanish Inquisition—in an effort to make those people incriminate themselves. I am not simply speaking for the underworld—I have no sympathy for law violation or for law violators, and all agents of the government who do not observe the law themselves are even violators of the worst kind, but I do believe in the fundamental principles of our government, and I believe that they apply quite as much and more to the agencies of the government as to the poor and downtrodden, quite as well as to the rich; they are the ones that are being oppressed; they are the ones that are being made enemies of your government by the unlawful practices of those sworn to uphold and defend the law. Many cases of this nature have recently arisen.

You have heard a great deal about being "held for investigation." "Yes, we have got them, and we are holding them for investigation." I say the same thing, gentlemen, about investigation, that I said about "raids." You will not find, in any law book in existence, any law which recognizes or gives the right to any police officer, constable, sheriff or what not, to hold anybody for investigation. The public think the authorities have a perfect right to hold for investigations; and, on being pinned down, how do you reckon they attempt to justify it here? Simply from a statute. We have one statute which provides that if, for any reason, any person is held for a longer period of time than twenty hours, for any purpose whatever—if any police officer, prosecuting attorney, sheriff, or anybody else, holds them longer than twenty hours, or keeps them from communicating with their friends during that time, that they themselves become guilty of a crime, and are punishable under that statute. That is the law. Here is your Constitution. "No man shall be deprived of life, liberty or property except by due process of law." This statute says if they hold them beyond a certain time, "without due process of law, thereupon the officers themselves be-

come criminals—and under that they are claiming the right to hold them for twenty hours, in the face of your Constitutional provision. This statute gives no rights—it simply punishes if the Constitutional provision is overridden. They never have the power to imprison without commitment, and never the right to hold beyond a reasonable time.

There is another statute in regard to oppression in office. That statute has been construed by your courts. Down here in Moberly, Missouri, there was a mayor named Ragsdale; and on an election day, some men were not acting to suit him. He told a policeman: "You go down and arrest those fellows and lock them up." The policeman arrested them, took them and locked them up, and kept them in the police station one hour and a half (you will find that copied in the information), and then turned them loose. There was no process, but they held them an hour and a half. As soon as they were released, they procured indictments against that mayor, for oppression in office, in that he deprived them of their natural rights without due process of law, and held them there for an hour and a half without process. The defendants under the indictment were tried by the jury, and the jury brought in a verdict of guilty. They fined the mayor fifty dollars, and as a part judgment of the court (which must follow in every case where a person is convicted of oppression in office), the mayor was made to forfeit his office as mayor and forever afterwards disqualified from holding an office of profit or trust again in this state; and he appealed that case to the Kansas City Court of Appeals. The case is entitled State vs. Ragsdale, 59th Appeal, 590, and in which our great Judge Jackson L. Smith affirmed the judgment of the lower court. That is the law of this state today, i. e., that you cannot for any length of time hold any person without due process of law. However, our police authorities here claim the right

to hold a person twenty hours "for investigation," in the face of the plain construction of that statute.

As I said in the beginning of my remarks, it seems that the further civilization progresses, the more the people are reaching out for more power, and the courts are the only restraining influences, and just in proportion as our constitutional principles are violated, just to that extent it works to the great detriment and injury of our country. I might discuss some of those questions, but time forbids. When our Constitution was first adopted, certain questions were left not very plain or definite. For instance, the doctrine of secession sprang up, by process of reasoning, and a great many of the biggest and brainiest minds in the country advancing the doctrine of secession, and they felt they had good ground for their reasoning, one of which was that there was no prohibition against secession in the Constitution, and that as it was a government of enumerated powers, and that all powers not expressly delegated to the United States, remained to the states respectively, or to the people; that they went into the Union of their own accord, and they could withdraw of their own accord—rather a specious argument—but an agreement upon that question could not be agreed upon, and a resort to arms was made, and it had to be fought out because not settled definitely by the Constitution; and then came one of the bloodiest wars we ever had.

After that war was over, just like in the case of our recent war, the enemies of liberty and constitutional government commenced reaching out for more and more power, and attempting to take away natural rights. Laws were passed forbidding people from voting unless they would sign a test oath, and then this great Constitution of ours, which is the charter of our liberties, was appealed to, and the great Supreme Court of the United States, the greatest body of its kind in the world, held that that was

violative of the Constitution, and that they had no right to pass any such law, and the people of the great South and the people of this great State of Missouri, who had been disfranchised, were enfranchised because of the protective features of that great instrument.

In your busy lives, take up this great question, study the principles of human liberty and human life, and see to it that "the flame of the lamp of personal liberty is kept well trimmed and brightly burning"—as was said by our great Judge Henry Lamm. It is a subject worthy of your best efforts, because if you give civil, individual and religious liberty, you give everything, knowledge and honor, virtue and power. Deny it, and you deny everything. In vain are the gifts of nature; there is no harvest in the fertility of the soil; there is no cheerfulness in the radiancy of the sky; there is no thought in the understanding of men. The human animal shrinks and withers, abused, disinherited, stripped of the attributes of his kind, a mere automaton, a mere thing, bereft of the image of his Maker. I repeat, see to it that the flame of the lamp of personal liberty is kept brightly burning, and that civil, religious and individual liberty in this country are preserved.

## LAW ENFORCEMENT—AND HOW[8]

The problem of enforcing law in the United States constitutes the most momentous question before the American people. Yet as a nation we are just drifting along, hoping that somehow it will right itself.

Proceedings of the annual meetings of the American Bar Association for many years show that lawyers and judges regard the crime conditions here as the worst in any civilized country.

[8] From article by Richard J. Finnegan, co-editor, Chicago Daily Journal. *Welfare Magazine.* 18:1551-65. December, 1927.

When one studies the minutes of bar associations, however, he is struck with the restraint with which speakers discuss matters like politics and graft in the administration of justice, subjects about which individual lawyers and judges are more frank in their private conversations. There is a popular cynical attitude toward law enforcement agencies, the basis for which bar associations do not admit nearly so honestly in their public sessions as their members confess privately. While speakers before the bar associations declare that all laws must and shall be enforced, there are many leaders of the legal profession who regard this attitude as a mere pretense or fiction because they find themselves part of a system that seems to be incapable of law enforcement, even though the American people have lavished money on it.

It is a habit of some people to look to the newspapers to solve all public questions. There are many of our foremost men and women who believe that the press must make itself the principal agency of waking the country to the perils of a wave of non-observance and non-enforcement of law. Indeed, there are some who go so far as to declare that the press is partly responsible for the crime condition which confronts us.

At any rate, given the subject of "Law Enforcement —And How," I was asked to make some suggestions as to what the press could do. It therefore occurred to me that it would be a good idea to consult competent persons who have pronounced ideas, not only on the subject of law enforcement, but on the matter of the relation of the press thereto. I took the liberty of addressing a number of prominent men and women in this and other states and asked them confidentially on the promise that their names would not be used, the real unvarnished facts about law enforcement as they saw them.

It is not difficult to establish that not only is there a widespread disrespect for law in the United States, but that there is a growing disrespect for those who make,

enforce and interpret the laws. And that on the part of those who make, enforce and interpret the laws there is a growing disrespect for the people who put them into office.

It is a general belief that the poor are caught and punished and that the rich are just as guilty but seldom caught, and if caught they escape the strict punishment meted out to the poor. Not so long ago a man who claimed that the rich criminals were getting special protection was regarded as a dangerous radical. Today the thinking rich admit it is an evil that must be acknowledged.

Whether there is a basis for it, a widespread belief exists that there is a special privilege in justice. Mr. Roosevelt pulled a political "boner" when he proposed the recall of judicial decisions, but he struck at something which many people believe to be a menace which breeds distrust of our law enforcing system.

For the failure of law enforcement, judges sometimes blame each other. They know the drones on the bench and those who curry favor with politicians and with contributors to political campaign funds. Judges often blame the police, the prosecutors, the jurors, individually and collectively. Prosecutors blame the judges, the police, and the jurors. The jurors blame the prosecutors, the police and the courts. The public blames the whole lot.

The bench and bar blame the public in the last analysis because the public does not go to the polls to elect competent officials and refuses to serve on juries. And the public answers that when enlightened, decent citizens appear for jury service, lawyers and court find ways of shunting them off in favor of jurors who do little thinking for themselves. To this judges reply that if enough high-grade citizens would do their jury service, lawyers would have to accept them when their peremptory challenges are exhausted.

Officialdom says that the people get the kind of law enforcement that the public conscience demands, which sounds like the statement of newspaper men that the reading public makes the style of journalism.

The first question in our symposium was in three parts:

"Do you think the law is enforced now as much as may be reasonably expected? If not, what, briefly, are the principal causes of non-enforcement? Who, if anyone, is mostly at fault?"

The almost unanimous verdict of replies from more than thirty lawyers, judges, bankers, church men, labor leaders, prison wardens and chaplains, clubwomen, social workers, business men and legislators was emphatically that the law is not enforced reasonably well. There were only four or five who disagreed. One of these, a seasoned legislator, believes the law is now enforced as well as most people want it enforced. Another, a prominent judge, answered that crime is no more prevalent today than at any previous time in the history of our country. Another judge believes that we are improving.

Causes assigned for non-enforcement were varied and interesting.

A well-known judge believes that there is too much catering to racial, social and business groups and that there is a lack of proper training of police which restricts their efficient service. He thinks there is slovenly preparation of cases by prosecutors and that there are too many law enforcement agencies working for selfish interests. He believes there is a lack of courage on the part of judges to follow the law and supreme court decisions strictly in accordance with their spirit and intent. There is a lack of power in judges to control procedure. The blame he places on the general public, first, and the police, second.

A banker of large public spirit, a student of affairs here and abroad, says that,

The law can be enforced in this country. This is evident by the fact that when a man without means commits a crime, usually he pays the penalty.

There is not much respect for the law when men are permitted to commit murder and other crimes and the juries and courts fail to inflict penalties or if the conviction is secured and the criminal is pardoned, something ought to be done. Of course you know that England is cited as being so much more free from crime than this country. Over there when a crime is committed the offender is punished according to the law and the law acts speedily. Here it is quite different.

Delays in the courts and miscarriages of justice, with which we are all familiar, are so flagrant that the criminal practically snaps his finger at officers of the law. Greedy lawyers, weak or dishonest prosecutors or possibly a weak or dishonest judge here and there must be largely responsible for this. In addition there seems to be a general desire even on the part of some of our best citizens to evade the law. Of course, if they can escape, the criminal at heart feels that he also should escape.

A nationally known labor leader places the blame for non-enforcement on the political ownership of judges. He says,

The judge must bow to the will of the political boss who permits his name to appear on the election ballot. The political boss maintains his power because he bows to the wishes of the ward heeler who delivers the votes. The ward heeler is a pool-room bum or a bootlegger and the final analysis is that it is in such hands we find control of our courts. The use of money will prevent action in 90 per cent of the court proceedings, either civil or criminal. We must check the cause of this condition.

A lawyer and executive with an international reputation answers that most laws are being enforced on poor persons who are without political "pull." He says,

I cannot recall a single case in which a wealthy man has received capital punishment. A man caught stealing a railroad or an oil field, robbing a warehouse full of grain or looting a bank, will get little or no punishment, but if he be poor and steals only a suit of clothes worth fifteen dollars he will go to the penitentiary.

This critic, like many others, blames first, the archaic criminal procedure which permits delays in trials, and discriminatory favors by police, prosecutors and judges to the wealthy and powerful over the poor and weak; second, mistrust of policemen's evidence because of fre-

quent occurrences of crimes committed by police, notably in shooting and killing men and boys whose only offense is to run away, in subjecting prisoners to the third degree, and in evading service of the habeas corpus writ.

An outstanding judge also blames politics as the first reason for the failure of law enforcement. He says,

> If we could divorce partisan politics from our courts of justice we would see a great improvement. As long as a political boss in either party is the chief law enforcing officer, we cannot expect an efficient and impartial administration of the criminal laws. Too many judges are off duty when they ought to be on the job while others are working hard.

A business man believes that the interference of friends of criminals who use political influence is the chief cause of non-enforcement. He says,

> Politics has too much to do with the police, state's attorney's office, the lower courts and incompetency of clerks of courts, sheriffs and bailiffs.

Part of the answer of a public official is:

> This government was founded to protect life, liberty and the pursuit of happiness. Life has become cheap. We murder people or kill them with automobiles at such a rate that there is nothing cheaper. We do not punish murderers or motor killers as we should, so why be surprised that all crime is getting beyond control? Justice Marshall of the Supreme court of Ohio in 1925 said that there were one hundred and seventy-five thousand murders committed in the United States in twenty years, with fewer than one thousand, five hundred convictions and executions. Allowing for deaths, he figured there were one hundred and thirty-five thousand murderers at large in the United States. Liberty, too, has become cheap. Witness a man in Michigan sent to the penitentiary for life for possessing a pint of liquor. All we have left is the pursuit of happiness and our reformers are fast taking that away from us.

A conspicuous judge places the blame for non-enforcement on the war, which caused a breakdown in respect for life and property, which is reflected in a lack of moral idealism and respect for the law; and on the failure of so-called good citizens to serve on juries and to vote at elections or participate in politics, leaving those duties to the unintelligent and corruptible.

Lawyers and judges attack many shortcomings of the law. They do not all agree as to the changes that are necessary. Some want less than a unanimous vote on juries for conviction in all except capital punishment cases. Others suggest the elimination of the grand jury and the use of informations instead of indictments.

The constitutions require that a defendant be confronted in court with the witnesses against him. There has grown up a system of gangsters who kidnap, bribe, murder or intimidate witnesses making it almost impossible to get all the witnesses together at one time. A suggestion is that testimony of witnesses may be taken by deposition at a proceeding at which the defendant could face the witness before a master or a notary and that the state could afford to pay the expense of such a proceeding. Generally, Illinois is considered backward in its criminal law but legislators say that changes will be made only when public sentiment demands them.

Suggestions are that judges of state courts have the right to comment on the evidence, according to the practice in the federal courts; that juries be judges of the facts only, leaving the law to the judge; that the state be allowed to comment on the defendant's refusal to testify; that the abuses of nolle prosequi, the insanity plea, the parole and probation be corrected. Leading lawyers of our own state advise that there be no revision of the criminal code until experts of the American Law Institute, who are working on a uniform criminal code, make their recommendation to the legislatures of all the states in 1930, but others doubt whether this plan will succeed.

When one discusses law enforcement there is almost an immediate belief in some quarters that he is discussing only the enforcement of the prohibition law. Some people think that that is the first law that should be broken. Apparently the federal government regards it as the most important of the American statutes because in examination of aliens for citizenship papers it is the only law mentioned by name. A prominent police official in a large

city believes that the prohibition law is largely responsible for the present low regard for the observance and enforcement of all laws. He writes:

> The Volstead act has done more to bring the police, the courts and the law into disrepute than any single law ever passed. Before prohibition the political boss put over his biggest deals by protecting public utilities before the legislature, city councils and commerce commissions, and in political conventions, especially in the selection of judges. Now the public utility magnates are pikers when you consider the amount of graft that the bootlegging industry pays for protection. Bootlegging begets every crime in the calendar, up to murder. The gangs not only put up money to bribe the police, prosecutors and juries, but they wield political influence and on election day in some districts they can bring about the defeat of a candidate either by political strength, by bribing of voters or by stealing the election through manipulation of judges and clerks. Many men now in important offices made deals with lawless gangs to get there. Even judges fear the gangs.

A prominent lawyer states:

> Even judges disagree with the provisions of the Volstead act just as bootleggers do. I had a case in which enforcing officials seized a quantity of liquor. My client, a druggist, was found not guilty and was entitled to the return of the liquor that had been seized. There was a shortage of three cases and the officers who had made the seizure explained to me and my client that the three cases had gone to the judge who like his liquor and they didn't care to embarrass him by asking him to return them.

A zealous bishop, one who, however, is patient and philosophic, believes that the prohibition law is not as well enforced as it ought to be, but he thinks that, considering the long history of lawlessness of the liquor traffic, it is making some progress. He cites the fact that a drunken man on the streets of Chicago is a rarity and that homes for drunkards are going out of business. He thinks the prohibition law is doing good work.

Another bishop thinks that the prohibition law is not enforced now as much as may be reasonably expected because a considerable portion of people are determined not to keep it, because it is a difficult law to enforce and because there has not been a determined effort to enforce it.

Says this bishop:

> Disregard of the law of the land, or the defiance of the law of the land, strikes at the very roots of our social order. People used to tremble at the majesty of the federal law; now they ignore it to a large extent.

One Chicago lawyer blames some of our colleges for the disrespect for law among the young people. He quotes from an address made by a professor in a large university pleading for self-determination on the part of young men and young women.

> The old time respect for the law has been supplanted by an inquiry into its validity,

is the way this professor described the attitude of youth.

Says the protesting lawyer:

> That's what the bootlegger does. His respect for the law is supplanted by an inquiry into its validity and our youth is being taught to do the same thing. Contrast this college training with the statement of the Illinois Bar association that, "The uncorrected child of today grows up to be the law violator of the future" and, "There is no justification for the claim that certain laws cannot be enforced."

One prominent member of the Illinois Bar association calls the Volstead act unjust and tyrannical and says it cannot be enforced because it shocks the public conscience.

He says:

> Any law which makes it criminal to do what the founder of the Christian religion and his disciples did cannot be enforced.

A federal official calls attention to the statement of John W. H. Crim, former assistant United States attorney general, that each day at least twenty-five million dollars changes hands as graft to one hundred thousand city, county, state and federal officials for illicit traffic in intoxicating liquor and that one in every one hundred persons in the United States—or more than one million total—derives some or all of his livelihood from some phase of the booze game. This official writes:

From what I observe, the United States could put the whole United States army along the Canadian border and yet booze smuggling would not be stopped. The army, from private up to generals, would become bootleggers, just as many police, low and high are in our big cities.

A chaplain at a large federal penitentiary believes the eighteenth amendment is the chief cause of the non-enforcement of all laws.

A federal judge thinks that 50 per cent of the people in a large city where he holds court are violating the prohibition law. When they get on juries, not being hypocrites, they vote to discharge others who violate it; the law will never succeed because all federal judges do not give jail sentences, but some levy small fines to guilty offenders; he knows some federal judges who think the law is reasonably successful.

We know that this is a government of laws and not of men but he who runs may read the signs of the times —that great numbers of our people who are not organized into groups, blocs, and associations for the promotion of this or the suppression of that, are impatient with what they regard as sumptuary and restrictive measures affecting their individual freedom, which tend to make men and women all of one uniform mold. And in an unorganized but none the less effective protest against this tendency, they have allowed themselves to indulge in a slovenly and careless attitude not only toward the statutory restriction of Congress and the legislatures and the bureaucratic regulations of boards, commissioners and executive officers who are either clothed with or assume legislative powers, but also toward the most fundamental of American constitutional beliefs and standards.

Charles E. Hughes, discussing an "ordered freedom subject only to such restraints as a sound and tolerant judgment determines to be essential to the mutuality of liberty," says:

Every restriction of the authority of local self-government must show cause in the interests of the liberties and opportunities

of all and not in the mere desire of one or more communities or groups to govern the life of others, albeit for their own good. There may be an imperialism at home as well as abroad. . . .

In a democratic society, the enforcement of law finds its justification not in the interest of authority, as such, but in the maintenance of respect for law as proceeding from a free people and as being essential to liberty which vanishes if violence, turbulence and disorder usurp the place of law. Respect for law in such a society is a sportsmanlike regard for the rules of the game which cannot be had without rules. Be careful in making the rules and play the game.

Our capacity to protect life itself is in question. There is a manifest failure to secure, through an adequate administration of our criminal laws, an appropriate punishment of crimes, the deterrent effects of which are in large part the objects of these laws. . . . The chief cause is probably a laxity of public sentiment—a general flabbiness with multiform disclosures—the most difficult thing to correct. . . . Lawyers are largely responsible, I fear, for the lowering of the standards of justice, by seeking, if not demanding, an inordinate latitude, especially in sensational cases.

It is not hard to understand some people when they admit they contribute part of the laxity of the public sentiment because they do earnestly believe they are the first victims of an imperialism at home and that proper care has not been observed in making the rules of the game. And to this view they quote Lincoln:

> It is not much in the nature of man to be driven to anything much less to be driven about that which is his own business.

And Lincoln again:

> I know the American people are much attached to their government; I know they would suffer much for its sake; I know they would endure evils long and patiently before they would ever think of exchanging it for another; yet, notwithstanding all this, if the laws be continually despised and disregarded, if their rights to be secure in their persons and property are held by no better tenure than the caprice of the mob, the alienation of their affections from the government is the natural consequence; and to that, sooner or latter, it must come.

As observers of events, we must admit that in zealousness—partly official, partly fanatical—over some laws, other laws, even more important, have been despised and disregarded, and that the rights of personal and property security have been at the caprice of mobs—and still are in

some localities. And we know, too, that in many instances public officials sworn to uphold the law have been afraid to act to preserve constitutional rights until a free and courageous press has taken the lead against lawbreakers, even though they sometimes were in high places.

As evidence of the careful thought Lincoln gave to every public utterance he said:

> I am never easy now when I am handling a thought until I have bounded it north, and bounded it south, and bounded it east and bounded it west.

If legislative bodies would use that rule before passing laws, their statutes would be more easily enforced and there would be fewer law violators in the smaller things, leaving the public conscience and public officials free to deal with the larger crimes.

## OFFICIAL LAWLESSNESS[9]

There are times when, as a weekly journalist watching the daily press, I am tempted to write that the most numerous and active criminals in America are the officials sworn to uphold the laws of the several states and the nation. If one were to take at its face value half of what one hears about the great army of prohibition enforcers the statement would be true. I am ready, however, to change it to read that by far the most dangerous criminals we have in America are the officials who in growing number openly disregard or violate the laws.

There are many of our fellow-citizens who lie awake nights over the "red" menace, the alleged growth of communism in America, and shiver whenever they read of Socialist gatherings to hear sentiments which these timid souls believe to be aimed at the forcible overthrow of the government of the United States. I venture to say that all these "red" movements in America do not weigh

[9] From article by Oswald Garrison Villard, Editor, The Nation. *Harper's Monthly Magazine.* 155: 605-14. October, 1927.

in the balance in comparison to the injury done to our institutions and to popular respect for law and order by men in uniform or officials of high position in Washington or the several states. And I insist that not one of the numerous studies now being made of the so-called crime wave by official, semi-official, or private bodies will give a complete picture of lawlessness in America which does not include therein a survey of the unceasing examples of official misbehavior. For there is a widespread and often justified popular belief that especially those officials directly charged with law enforcement are utilizing their positions in order to feather their own nests or to put themselves above and beyond the law.

Who can measure the effect of the example of the two Harding Cabinet officials declared by the Supreme Court to have been guilty of selling out the interests of the United States, and of the ex-Attorney-General of the United States defending himself in the dock against well-grounded charges of corruption and refusing to take the stand in his own behalf? Can any half-educated Communist in a hundred speeches conceivably do as much to destroy people's faith in the American republic as does the spectacle of a governor of the great state of Indiana in Atlanta Penitentiary for fraud, or the head of the United States Veterans' Bureau in Leavenworth prison for robbing the government and cheating its pitiable soldier wards? What does the average American think when he reads of the conviction for official wrong-doing of the Alien Property Custodian; when he learns of another governor ordered by the Supreme Court of his state to return to the treasury of the state eight hundred thousand dollars held to be unjustly taken and justly due by him; of the present governor of Indiana involved in a far-reaching scandal; of a former governor of Texas successfully impeached, and then conspiring with a successor, his own wife, to empty the prisons by an indefensible abuse of the pardoning power, to say nothing of wholesale charges of corruption in state contracts?

I do not wish to dwell upon the long list of high officials who are guilty morally or legally or both; nor even to touch upon the demoralizing defiance of the Constitution by the Executive and the Congress, who refuse to punish violators of the fourteenth amendment with the result that some millions of our fellow citizens are illegally disfranchised because of their color and are thereby convinced that even the Constitution may be violated freely by those who have the power and the duty to enforce it. There will not even be space to touch upon the deliberate refusal of (two) Presidents to carry out that provision of the Merchant Marine Act of 1920 which orders the Executive to give notice of the termination of certain articles or provisions in commercial treaties to which the United States is a party. These articles restrict the right of the United States to impose discriminating customs duties on imports entering this country in foreign bottoms and to levy discriminating tonnage dues on foreign vessels entering our ports. In this case these Presidents deliberately refused to enforce one of the laws they solemnly swore to uphold. Nor shall I rehearse again the endless cases of local officials who have set themselves above the Constitution in matters of civil rights such as the holding of legal meetings, the freedom of the press, the free expression of private opinion however unpopular, etc., etc. * * *

In England it could hardly happen, as in Philadelphia recently, that a magistrate could be sentenced to prison for six years for corruption. This man pleaded guilty to extorting from liquor-law violators more than eighty thousand dollars in the ten months before his conviction; there were literally hundreds of specifications. His hands itched for bribes. What a fearful blow he struck at the dignity of the law and the respect in which it should be held! Again, in England during the general strike there were actually fewer cases of disorder in the courts than are usually found there in the same number of days. In America there is scarcely ever a strike in

which the masses of the working people do not believe that the police, so far from holding the scales even, are on the side of the employing class. The army of Passaic strikers saw the police denying civil rights to their sympathizing friends from New York, suspending constitutional guarantees, and beating up strikers who were well within their legal rights. Can anyone expect these workers to hold the law in awesome respect or to believe that justice is enforced with even hands?

In the State of New Jersey the public has also read of the conviction of a lieutenant of State Police and of a trooper for the murder of a woman and the shooting of her brother. They were guilty of gross abuse of their authority and the illegal use of their weapons. Three other troopers have just been arrested for beating two restaurant employees. In Pennsylvania the state police have frequently sided with the employers, and the deniers of civil rights; at least this is the belief widely held by masses with whom they have come into contact. The result is the same: the persistent belief that the law-enforcer is biased and considers himself above the law.

But why go on? One could recall that the Department of Justice in Washington has set the worst kind of example, as witness the suicide of Andrea Salsedo, who leaped from the fourteenth story of the Park Row Building in New York City as a result of repeated tortures, physical and mental. The Department's agents inflicted upon him grave bodily injuries; they held him in confinement without due process of law; they threatened him with pain and death until he became insane. But this is only one of many cases. A body of lawyers of the highest standing reported—and proved—that in this land of liberty the agents of the Department of Justice arrested.

> Great numbers of persons . . . in wholesale raids without warrants or pretense of warrants; many of these, the committee found, were threatened, beaten with blackjacks, struck with fists, jailed under abominable conditions or actually tortured.

It is no excuse for these or other abuses, such as the wholesale official thuggery against the Chinese in many of our cities during the year 1925, often without warrants, to say that they were in part the result of war hysteria. Officials, the United States Department of Justice, and the courts are there precisely for the purpose of dealing out *justice,* not hysterical oppression—for the very purpose also of keeping their heads when the public and the press lose their judgment and self-control. At least such a spectacle ought to make us extremely charitable in our views as to misgovernment in certain "backward" nations. The wonder really is, not that the law stands so low, but that it has any standing at all; not that we have crime waves, but that we have so few and such relatively small ones in view of the widespread official criminality.

This, then, is the revolutionary remedy. Let it be ordained that:

> From this day forward all officials, whether of a municipality, a county, a state, or of the federal government, shall themselves cease from all violation of the laws, state and national, and of the Constitution of the United States.

Let the physicians of the law first heal themselves.

## DO WE NEED A CODE OF ETHICS FOR THE PUBLIC[10]

The mental attitude of a large proportion of the American people towards law is fundamentally the greatest obstacle in the way of an effective and efficient administration of justice, both civil and criminal. In their point of view respecting the relation between the state and the individual, myriads of our citizens are positively unmoral; they are utterly devoid of any sense of personal obligation as functioning units in the organism we

[10] From paper by Judge Gveinbjorn Johnson, given before the meeting of the Illinois State Bar Association. June 25, 1927. *Illinois State Bar Association. Proceedings,* 1927:306-20.

call the state; and when they function they seem governed by motives and reasons which, by the most liberal standards, cannot be dignified by the name "principles." Whereas bench and bar have defined in careful detail the rules by which their conduct shall be governed and in terms which stir the admiration of thinking men, the third side of the triangle of justice, the voting public, not only admits no duty upon itself to insist upon standards of high honor in those who have a responsible part in public affairs, but actually shows its contempt for virtue by discharging the obligation of suffrage in a manner which no high minded or thinking person, who has left some respect for his own character, has the audacity to defend, unless, of course, he has discarded as unsound the very foundations of our economic and political system. The public attitude towards administration of justice is no less reprehensible, no less a handicap to its efficient administration, than is the conduct of the voter at the ballot box an obstacle in the way of political government upon a high plane. Indeed, a citizen cannot at the polls manifest his contempt for honor in the candidate for public office, judicial or non-judicial, without throwing the machinery of justice out of gear. Yet, they do it in every election somewhere in our great country; and the men and women who do it, go home from the polls to join the unthinking in denunciation of the courts and of the lawyers because a criminal has escaped, or justice moves too slowly to suit in a particular instance. This is not flattering; but I am not here to flatter. I am somewhat impatient of the steady downpour of criticism upon the bench and the bar, sometimes from the very persons whose want of idealism and devotion to decency in the public service is shockingly manifested on election day. I appeal to the record; let it disclose the grave need for some sort of ethics, of finer standards of conduct, in the third partner in the enterprise of doing justice in this republic.

In the Norse law four elements were deemed essential to the correct administration of justice. I translate: (1) "They are mercy, truth, righteousness and peace. Mercy shall prevent angry and malignant judgments; Truth shall be kept that false testimony may not be advanced; Righteousness shall prevail that decisions be not influenced by unfair means; and Peace shall be preserved until right judgment is pronounced, to the end that no unjust or frenzied judication shall be made." Then follows the simple code of ethics by which the judges shall be governed—a code as sufficient today as it was seven hundred or a thousand years ago. Again I translate: (2) "Let men be reminded that there be four ways in which unjust judgments come about: from fear of him whose interests are touched by the decision; from avarice, where there is an expectation of reward; from malice towards an interested party; and from partiality due to friendship for one side." It is ill-omened when these bastard children are admitted to displace the legitimate sisters who have been named before; for evil will such judgments seem to men, but worst of all to God. It were better if this chapter were often read where important cases are to be decided.

I next transport you to another scene—a judicial trial in England of the thirteenth century. The litigants are in "court;" the issues are made; the trial commences. Into the arena, marked off for the purpose, steps a muscular ruffian, not the plaintiff himself but one hired by him; from the other side enters another desperado, likewise a hireling, but this time of the defendant; and the battle is on. The principal of the winner of this contest is the victor in the litigation—thus hath truth been ascertained and justice satisfied. Meanwhile, as the trial progresses, the crowd gathers and as points are made by one or the other combatant the spectators generously give him their applause. And when the case is over and men retire from the field, the talk is all of the prowess of

the one or the other fighter; never a word or hint that Justice has claims which have not been fully vindicated. The viewpoint of the public, again, as in the Scandinavian countries of old, is that of the lover of a game where skill and "gameness" in the contest elicit, as of right, the generous hand of approbation.

Again we leap the chasm of the centuries and find ourselves in the court room of today. A wealthy and prominent citizen has killed another wealthy and prominent citizen; the newspapers have broadcast the pictures of the principals with all the racy details leading up to the homicide. When the trial opens the public is present filling the court room; that part which can't get in receives its thrills through reading the illustrated press accounts. Capable and well known lawyers appear on both sides. The trial opens; and it is not long before the battle is on in very much the same sense as of yore in ages which we now choose, in our self-complacency, to call dark by comparison. True, the weapons are different; they are now the arts of the debater, the wit, the artist at repartee, the technical rules of modern procedure. But what does that matter? The applause of the court room, the gallery, the unthinking public, goes to the clever fencer with words and technicalities, though he may be striving to save from punishment the red-handed killer, the avowed enemy of human society. It is still the lover of good sport giving his sympathy to him who smartly plays the game. Here are lawyers, bound by the most rigid rules of good conduct—unfortunately they do not always observe them, perhaps sometimes because the tactics of the *other* fellow win the favor of the crowd, which may easily be communicated to the jury; here is a judge bound also by an oath as a code of ethics to conduct himself in a seemly manner in the judicial office; and here is the public which, for the most part, sees nothing in the drama going on but an opportunity for amusement or diversion and a con-

test of skill between individuals—between lawyer and witness, or between opposing counsel. This partner in the scheme of justice seems quite incapable of visualizing a state, of appreciating that there is an unseen third party to every law suit whose sole interest is that the truth shall be discovered and justice under human law administered without sale, denial or delay. Every man who has had some judicial experience understands the fierce handicaps put upon judicial processes by this popular attitude towards the real purpose of a criminal trial. It surrounds the court with an atmosphere akin to that of the arena for the bull-fight or the fistic championship contest. The public, without ethical standards like those which bench and bar have imposed on themselves, without imagination sufficient to see the public interest involved in every trial, and utterly without a feeling of responsibility for the manner in which this part of the public business is done, looks on with amused indifference while the gladiators spar. There are great lawyers who disdain the arts which merely bring applause; there are great judges who hold in check the vain and unscrupulous barrister. But the public does not always see or appreciate their virtues; they labor under difficulties calculated to try men's souls.

There is still another aspect to this public indifference towards the legal system, especially in the large cities. It is notorious that the underworld is seldom divided; that it knows the caliber and the characteristics of judges and officers concerned with the administration of justice in the large centers of population. If a man is "easy" they are solidly for him; if not, they are against him and the result is only too often disastrously apparent when the ballots are counted. Why is it that in some of the large cities eminently fit and capable men are retired from office, to be succeeded by others less qualified? It is not because the lawless outnumber the law abiding citizens; it is because the so-called "best

people" or "good citizens" are asleep or indifferent both before and on election day. Instead of loyally supporting a courageous, firm man in the judicial office by insisting that all decent people go to the polls, they forget all about it until the incompetent is in, when they bestir themselves to criticize the courts, the lawyers, or our legal system as a whole. Some of our "best people" are the most perfect illustrations of unintelligent hindsight in all Christendom.

And do I, then, sound merely a note of pessimism? I hope not. I trust I have succeeded, in at least a small way, in directing attention to the need of education of the public to realize that it has a definite responsibility in the administration of justice; that while there must be no relaxation of effort to maintain the highest standards in the practice of the law, our system will scarcely rise much above its present state until the public, as well as bench and bar, recognize the binding force and immutability of certain principles of conduct. Until the public sees in a law suit something more than a contest of skill, and understands that it has a distinct interest in every case that the right shall prevail, we struggle against the current in trying to improve the machinery of justice.

## MOB VIOLENCE[11]

Practically all of our enlightened citizens are at least passive opponents of this form of lawlessness. Today the crime of lynching in nearly every case is committed by a very small proportion of a community, but its respectable and law-abiding citizens are in no small degree responsible when a mob riot occurs. Too often they have sat silent, dignified, and lethargic and have allowed the ignorant, the idle, and the vicious to usurp the power

[11] From article by Professor William O. Scroggs, Ph.D., Louisiana State University, Baton Rouge, La. *Southern Sociological Congress*, 1916. 1918. Democracy in Earnest, p. 185-90.

they are unfit to wield and to strike at the very foundations of law and civilization. Since each of us plays some part in the development of that public sentiment which makes for or against the rule of the mob, we cannot escape the logic of the conclusion that none of us is wholly free from blame for the evil of mob violence in our country.

There are times indeed when the mob has exerted itself more effectively for justice than has the corrupt or inefficient or tyrannical government which has sought to restrain its activities. The mob that stormed the Bastille, for example, was furthering the cause of civilization. Instances of this kind, however, occur only at rare intervals of history, and even in such cases the desirable results are achieved at enormous social cost. Mob law at its best is a heroic remedy, like a major surgical operation, to be resorted to only when all other measures have proved ineffective and society is in imminent danger of disintegration. In times of war or rebellion, when the normal modes of judicial procedure are impracticable, summary and extra-legal methods of dealing with serious offenses may be justified. In like manner, in frontier communities, where the law is still in its swaddling clothes, something closely akin to the methods of Judge Lynch may be necessary as a preventive of anarchy. No one can truthfully say, however, that we are confronted with any such conditions today.

Nevertheless, self-seeking politicians have at times brazenly championed the cause of the lyncher, whom they depict as the defender of womankind. Such tactics undoubtedly offer a means of winning the support of certain classes of voters, but the prevailing idea that lynchings are mainly a result of crimes against women is wholly erroneous. Such crimes are not now and never have been the chief incentive to mob violence. They have been only an excuse for mob violence. Lynch law had its origin in communities lacking an organized gov-

ernment; it was at first the only law to which an outraged citizen body could appeal; it did not defy existing law, but was only a substitute for a better law yet to come. It was a corrective of defects in an inchoate society. It should be noted, too, that in its early stages lynch law was uncontaminated with race prejudice, and was employed mainly against white offenders. Today, however, the frontier has vanished; the machinery of justice is everywhere available, and lynching no longer consists in the meting out of justice by private citizens in default of public law.

Let us examine the stock arguments now advanced by the upholders of mob law. Briefly stated, they are: first, *that it prevents crime,* and especially crimes against womanhood, by securing the widest publicity for the terrible penalty that follows the commission of such revolting deeds; *secondly, that it does away with the law's delay* and imposes the penalty at the very moment when the community is keenly alive to the enormity of the offense and the lesson is most likely to be driven home; and lastly, *that it spares the victim of atrocious crime the trying ordeal of reciting the details in a crowded court room.*

A careful study of the facts fails to substantiate a single one of these defenses. In the first place, far from acting as a preventive of crime, lynching tends actually to increase it. It defeats the very object at which it expressly aims. It does not prevent ravishing. Assaults upon women have frequently been repeated in neighborhoods where a mob had only recently dealt with a previous offender. Instead of checking wrongdoing, mob violence is apt to arouse a morbid state of mind that tends to manifest itself in anti-social acts. By provoking irritation, suspicion, and bitterness between the races, it only fertilizes the soil for a larger crop of lawlessness.

The terrible punishment [in one of our neighboring states some years ago] did not put an end to crime

within that state. In the following year the number of mob murders within its borders increased 25 per cent, while the next year brought a further increase of 70 per cent. One crime does not prevent another. It has become almost a truism that cruel and unusual punishment, instead of deterring crime, serves rather to increase it. If the punishment is to deter the would-be criminal, it must be prompt and sure, not actuated by the spirit of revenge, devoid of degrading effects upon the public, and strictly in accordance with the law of the land. In none of these particulars save, perhaps, that of promptness, does lynching meet the canons of modern penology.

Not only is lynching no preventive of crimes against women, but statistics prove that only one time in four are such crimes the cause of lynching. In 1915 only 16 per cent of the persons lynched were charged with crimes against womanhood. But even if the lynchings were the result of such crimes mob law would still not be justified. For who constitute the mob? Since frontier days the quality of the mob has greatly deteriorated, and today it generally consists of the worst elements of a community. By what right does this degraded mass of humanity constitute itself the guardian of virtue? Have we fallen to such low estate that woman's honor can be avenged by such as these?

With regard to the claim that mob violence prevents the law's delay it may be said that the law's delay is not for the poor criminal, be he black or white. The law's delay is the luxury of the rich and the influential. The guilty negro in our courts rarely escapes conviction; indeed, he usually receives the extreme penalty of the law. On the other hand, the mob often makes mistakes and wreaks its vengeance on the innocent, while the real offender goes free.

Mob violence today is utterly without excuse, inimical to the progress of civilization, and a crime against society. In attempting to show wherein it is an enemy

of both races, I have not deemed it necessary to specify wherein it is injurious to whites and wherein it is injurious to blacks. It is only necessary to show that it is injurious to humanity. The evils resulting from mob riots may eventually affect us in ways that we do not now suspect. Violence by groups tends to beget violence by individuals, and thence by whole republics. If fifty or a hundred men can put themselves above the law with impunity, the time may come when one man or a nation may do likewise. If we tolerate anarchy in dealing with criminals, the time may come when we shall have to tolerate it in other matters.

The mob exercises absolute power without incurring an iota of the responsibility that should always accompany the exercise of power. Mob law means government by passion, the worst possible government that can be devised; it results in the supplanting of reason and judgement by the emotional insanity of the crowd; it creates intense racial hatred, and thus works to the grave injury of both whites and blacks. "It is the duty of all good people," says a noted Southern bishop, "in all parts of this country to unite in putting down the mob. For let us be well assured that the good people will put down the mob or the mob will put down the good people."

# REMEDIAL MEASURES

## CRIME AND THE CRIMINAL LAW[1]

There is very little exact information available. A skillful writer may write attractive articles, such as Mr. Child's. But for a student of American criminal justice to write anything that will do much good is another matter. Such things as the controversy between the district attorney and the police commissioner in Boston, or the recent controversy between Mr. Goodwin and the district judges, are illuminating. Each blames the other. But I doubt whether at bottom either is much at fault.

The whole system, judicial and administrative, is ill-adapted to its tasks. Each sees his own difficulties, but not the real source of them, and attributes them to the other. The trouble is not with the officials but with the system in which they are entangled. Again, there is a general and somewhat blind hue and cry against too many laws. Yet when things do not go as we wish, there is at once a vigorous cry for legislative action.

Those who habitually cry out against so many laws were not the least active last winter in forcing upon the legislature a very doubtful law interfering with that individualization of penal treatment, which is necessary to the administration of justice and will come about, in one way or another, in spite of all statutes. My fear is that, for a time, much unwise legislation and some unwise magisterial action, which will but aggravate the situation, will be the chief result of the magazine, newspaper, pulpit campaign which is now on.

[1] From Memorandum by Roscoe Pound, Dean of the Harvard Law School, published in the Boston Herald, August 29, 1925. *Massachusetts Law Quarterly.* 10:60-5. August, 1925.

As things are, it is not possible to make any intelligent comparison of crime in America with crime in other countries. We keep no adequate or reliable statistics, and the labor involved in getting at the facts, even for a given locality, is prohibitive. Moreover, in continental European countries, much that we treat judicially is dealt with administratively and does not figure in judicial statistics. Hence, supposing we had any reliable American statistics, much allowance would have to be made. A great deal more of detailed knowledge of continental administration is called for, in order to make any useful comparisons, than any of us have, even if we knew what the facts are for this country. Not a little depends on what is called "crime". If all violations of police and administrative regulations were to be classified, as with us, and there was a prohibitory law to be enforced, figures from European cities might look different. I have seen figures as to "homicides" in the United States which included every automobile killing, on the ground, I suppose, that it was presumably a manslaughter.

Undoubtedly there are some peculiar American conditions making for "crime". But America is a large order. Is includes huge urban areas, some of which have almost grown up over night, like Cleveland, or Detroit, or Los Angeles, some on sites settled within a century, like Chicago. It includes frontiers, like the Texas-Mexican border and communities where the memory of the frontier is yet green. It includes communities like Oklahoma, opened to white settlement within a generation. It includes mountain communities where the feud has hardly ceased to flourish as a social institution. With these it lumps the old settled communities of the Atlantic coast and the average law-abiding rural community. Sir John Fortescue said that more men were hung for violent crimes in England in a year than in France in ten years; and he thought the reason was that the English had more "heart" —i. e., more courage. Something of the pioneer inde-

pendence and resentment of control is no doubt behind much of what we are now denouncing as a lawless spirit —as if it were something new, instead of a characteristic American phenomenon from colonial times to the present.

But much more of what seems current disregard for law is connected with the change from a rural, agricultural society to an urban, industrial society. Modern urban life is so specialized, and demands of necessity so much in the way of police and regulation and administration, that the reasons for legal precepts are no longer on the surface, and do not make an effective, immediate appeal to the sense of right of the mass of the people in their everyday action. As Americans tend to think for themselves, instead of doing blindly and trustingly what they are told to do, a great deal of ignoring or evading of legal precepts has always gone on.

From the head of a big business, chafing under legislative restrictions on the conduct of his business, with well-paid counsel to advise him how to evade them, or the owner of a new Ford, who can see no sense in the latest traffic regulation, there are infinite gradations of self-reliance, righteous protest, indifference, lawlessness and crime. But these are no new phenomenon. Simply with the growing complexity of our urban, industrial life it is more noticeable and often more serious in its results. We shall have to learn better. But we can't change all at once the modes of thought that have governed Americans for three centuries.

We have got to learn the art of administration. Little administration was needed in rural, agricultural, pioneer America. Our inherited mode of thought was averse to administrative government. Our bills of rights call for governments of laws, not of men. But it takes men to do things speedily and with some individualization of results; and a huge metropolitan area requires the speedy doing of many things. The crude doings of things speedily and crude individualizations of application that go on

while we are learning, with the accompanying favoritism, political pull, even graft, or, on the other hand, the stupid stickings in the bark of the law, do not increase respect for our legal order.

Moreover, our whole science of law in the past has ignored the subject of enforcement. We had supposed it was enough to consider whether legal precepts were abstractly just. Enforcement was supposed to be no concern of the lawyer. Some said if laws were not enforced it was the fault of the executive. Some said if laws were not enforced, it showed that they were not really laws. If they truly expressed abstract justice, their intrinsic appeal to the individual conscience would make them effective in action. Others said that if they were not enforced it showed that they did not have their roots in the life of the people. We must give over this sort of a priori dogmatism about enforcement. The whole subject needs to be studied scientifically so as to give us some reliable data as to what laws are effective and what enforcing agencies achieve their purpose, and why.

Not a little of what has just been said is of world-wide application. A transition is going on everywhere. Strain upon law and upon legal institutions is not at all confined to us. Conditions since the war and since the Volstead act have brought home to everyone in America what jurists had been discussing in many lands for the last 25 years.

As to the agencies to which we should look, I suppose they must be all the agencies that make for intelligence, understanding of the facts, and social improvement. But the most important point just now is to ascertain the facts. Very little of what is said and written on this subject has any sure foundation in exact knowledge of the facts. Next we must provide for competent and intelligent study of the facts. As things are, it is nobody's business to gather and verify them or to study them. What is done in this way is done for some special

purpose and to prove some preconceived point. Perhaps the first step toward something better would be adequate provision for research.

Our whole system of criminal justice, devised for rural, pioneer, agricultural America (and still working reasonably well in rural communities, where the conditions obtain for which it was devised) needs to be studied functionally with reference to the needs of urban, industrial America of today. I wish it were possible to have a survey of criminal justice in Massachusetts, doing better for a whole state what Prof. Frankfurter and I sought to do in the Cleveland survey. Then we should be able to put a better valuation on the projects that are submitted to the legislature and advocated more because it is evident that something should be done than because it is clear what that something is.

Also the whole subject of legislation—what it can do well, what it can do passably, and what it can't do—needs to be studied functionally. A century ago we distrusted courts and executives and trusted the legislature. Now we distrust the legislature, in comparison. But courts, and to some extent executives, labor under checks that come down from our distrust of them. In particular we need to study the relations of law and administration. Also we need to study judicial organization and administration functionally.

In short, before we shall have the data on the basis of which we may expect to achieve anything of lasting value, we shall have to have research—long continued and scientifically, and impartially carried on. I have been studying this subject since 1906, and have at least learned that no one man is equal to the whole of it for the whole country. I hope that before long reasonable endowment of research may be provided in our better law schools. Such endowment could not fail to be fruitful. Nowhere else is there opportunity, nor are there equal facilities for doing the work continuously, scientifically, and free

from political influence. Hysterical crusades, without any solid basis in scientific ascertainment of the facts, are likely to produce such things as the legislation taking away the control of trial judges over the trial, which began in North Carolina in 1795, and spread over the South and West in the last century, to the detriment of American judicial administration; or the legislation of what one might call the "Jefferson Brick" era of American institutions, in which, as a result of legislative overconfidence, popular impatience at the slow adaptation of English law to American conditions, and it must be confessed, the over-conservatism of lawyers, who were not willing to take the lead in intelligent reform, many unfortunate features of American criminal justice, which vex us today, had their origin; or the reform of procedure in New York in 1847, which made judicial procedure in that state technical, dilatory and expensive for two generations.

## LAWYER AND THE PUBLIC[1]

We live under a form of government which permits no man to escape with honor his proportion of service to the public. We live under a form of government wherein for better or for worse every man must inevitably affect in some way the public weal. Whether he is at the head of a great transportation system or merely a pauper in an almshouse, his influence for weal or woe is felt somewhere and in some way and to some extent. We are, in other words, in a large, stronger, more important sense than ordinarily understood, sovereigns. We carry with us the obligations and duties of a sovereign. We cannot escape responsibility.

The difference in responsibility between a man in public office and the citizen in private life is one of

[1] By Senator William E. Borah, of Idaho. *American Bar Association. Report.* 1916:395-407.

degree only. Both are bound in the highest way to give of their time and their thought to the public, the former more continuously, perhaps, and more specifically, but the latter, though less continuously and less specifically, no less certainly. If there is a bad law upon the statute books the legislators alone are not to blame. If the laws are poorly enforced the executive branch of the government alone is not responsible. If evil exists in the community, if injustice or oppression somewhere prevails, the officers are only partially responsible. We cannot discharge the duties of citizenship by simply technically obeying the law, or by finding fault without offering a remedy. We must mold public opinion which makes the law, direct public opinion which enforces it. We must, above all things, perform in full the duties of citizenship before we condemn for inefficiency the institutions under which we live. The call is less for a change in institutions than for a change as to the vigilance and civic activities of individual citizenship.

"Those eighteen men upon whom the tower of Siloam fell and slew them, think ye they were sinners above all men that dwelt in Jerusalem? I tell you nay." If there be evils menacing our institutions, if these evils seem to strengthen year by year, the law makers and administrators of the law are not the only sinners in Jerusalem. This is our government. We are its custodians. We are bound, then, in private life to be alert every hour and exert our influence in every reasonable way for its betterment or protection. Behind the officers who seek to know the right and to do it there should be a well-organized and well-sustained public opinion that they may not make their fight in vain. The public has no more right to elect a man to office and then turn its exclusive attention to private affairs, leaving him without the support to which he is entitled, than the rank and file has to desert the general upon the field of battle. The officer who takes his oath, assumes a place in public service and then devotes

his time to private affairs, or gives it over to personal pleasure, affords only a more conspicuous example of reprehensible citizenship than the man in private life who finds fault with the state and the government, but gives neither time nor thought to the caucus, remains away from the primary, or on account of business fails to go to the booth on election day.

But if the lay citizen owes something to the public, far greater the obligation of the lawyer. Obligations to the public are to be measured according to ability and opportunity to serve the public, and the public interest has a right to exact services in proportion to our ability to meet the exaction just as the government should collect taxes in accordance with the ability to pay. Ever since communities began to adopt rules by which their members consented to be governed, the lawyer has been of great and exceptional service to the public. He has been called upon in almost every emergency, from the drafting of the more important ordinances of a town meeting to the most tremendous concerns of state, and when called he has in the past given of his time and learning without money and without price. No member of the profession looks back upon those services characterized with singular wisdom and self-sacrifice without emotions of professional pride. But the days that have gone carried no greater responsibilities than the days that are coming. Almost every conceivable question, almost every matter of moment to the citizen at this time involves in some way a knowledge of law and the training which enable us to adjust well-known legal principles to our new industrial and social conditions. And if I were going to put in homely words, almost in the language of slang, the plea of the American people to this honored profession in the present crisis of our affairs, I would say their plea is that in this great task of readjustment and of extending legislation to new matters the American Bar give of its marked ability to keep the jokers out instead of its marked ability to put the jokers

into such legislation. A joker, as you know, is a legislative deception, a lie upon which, through the carelessness of some or sinister motives of others, the great government places its solemn and sovereign approval.

Our courts are being constantly assailed for constructions placed upon our statutes. But candidly, the marvel to me is, in view of the influences which surround legislation, the careless and indifferent manner in which bills are drafted, the selfish, sinister influences which warp and twist our statutes in the making, that the courts have done as well as they have in interpreting them. When legislatures and Congress enact laws, so involved and ambiguous that their meaning is difficult of interpretation by the authors of the law, it is no surprise that courts sometimes fail to apprehend their purpose or differ as to the construction to be placed upon them. Some people seem to think that we need for the bench not lawyers but clairvoyants and mind readers.

What a powerful influence for good if these statutes in their framing, as they are slowly passing with their belated gait through the halls of legislation, could have the scrutinizing and fearless attention and criticism of our great lawyers, acting solely and alone in the public interest. For there is to my mind no more independent, free and untrammeled influence for good government and for great things in a community than the lawyer of character and ability. He secures his business because of his great capacity to take care of it. Men employ him whether they like his views upon public questions or not. His intellect, therefore, is the slave of no combination in politics, his tenure of position in the community turns not at all upon the fortunes of political parties. If the American Bar would look in upon our great statutes, especially as to the more important and leading measures, somewhat as the great lawyers in private life looked in upon affairs in 1688 and 1787, it would be a wholesome influence, the extent of which could be measured neither by time

nor words. You say that this is a great deal to ask, a great deal to expect that men turn aside from their personal concerns to help with the work which others have been selected to do. But I reply that there is a vast amount at stake and further give it as my deliberate opinion that these institutions of ours cannot be kept intact if we are to depend alone upon those who happen to hold public office. Ours is a government of public opinion, not in a superficial way but in a most profound way. It was designed to be so and it cannot thrive, it cannot live, except it be sustained by a well-informed, eternally vigilant and thoroughly sustained public opinion. I know, and you upon reflection will agree with me, that the best laws, the great charters of right and justice, the profound movements for a richer and broader political level have not originated in official life nor in the starved and technical atmosphere of bureaus and departments. But they have sprung from the great body of the people, independent and hopeful, and have only passed to the legislative hopper for final form.

There can never be a more serious strain upon free institutions than that which is brought about in an effort to adapt the principles of established institutions to new industrial and social conditions. If we shall avoid destroying that which is essential to free institutions and at the same time incorporate the things which are necessary to meet the new situation, we shall have need of all aid which may be summoned from the entire body of the people. In an event like this, the public, our children and our children's children, the present and the future, are entitled to the best brain and the noblest capacity of the greatest of all secular professions. The American lawyer looks out upon a field crowded with problems equal in moment and fully as difficult as those with which Selden and Marshall dealt. He ought to find time, if possible, to share in the pleasure and exhilaration as well as the glory of working not now and then but daily in this vineyard.

But while this seems to be the plain duty of the lawyer not in office, what are the equally plain and more obvious duties of a lawyer who has entered the halls of legislation as a sworn officer and with the public alone for his client? Upon this subject I am quite aware that I hold views different from many members of the profession to whose integrity and learning I pay the tribute of my respect, though I cannot agree with their views. I do not believe that a lawyer has any more right, as a matter of correct public service, to hold a retainer while writing a law in the public interest and that a law which may affect his client adversely, than has a judge to hold retainers from those whose interests may be affected by the decisions which he renders or the judgment which he signs. This will seem to some an unreasonable statement, but I challenge anyone who has the time to analyze thoroughly and consider all the facts to distinguish upon any grounds, except fanciful ones, the difference between the two situations. Is it not as important to the public that laws be framed free of the influence, conscious or unconscious, of private interests as that they be administered free of such influence? Custom has inured us to a different code of ethics, but this custom has brought in its wake many inapt, inefficient statutes, timid and ineffective in their terms, shielding special interests and protecting private advantages and altogether inefficient for the service and protection of the public interest. I maintain that many of our important statutes are inapt and ineffective because of that timid, compromising spirit born of an effort to adjust conditions which cannot be adjusted and which ought not to be adjusted.

There is no relationship in the business world closer or of a more confidential nature than that of lawyer and client. The danger line of the lawyer is not on the side of not going far enough for his client, but rather that in his zeal and interest he goes too far. The characteristics of a great lawyer are that he makes his client's case his own, sympathizes with him, takes on his view, becomes

in spirit as well as in fact his advocate, and his difficulty lies in restraining himself in emergencies against doing those things which he would not think of doing for himself. Impossible or unreasonable constructions are placed upon laws and backed up by ingenious arguments wholly out of zeal to do his full duty to the client. The very trust reposed arouses a high-spirited man to the fullest exertion of his power. The relationship of client and attorney is the closest. Consciously or unconsciously he comes to feel that his client's demands are wholly just. Yet men will argue that a lawyer with a thirty or forty thousand dollar retainer from some client is perfectly fitted to shape legislation which his client will argue is all wrong, wholly unjust and vitally injurious to his business interests. I am not speaking now of a conscious corruption which some people assume to take place in legislation more often, perhaps, than it does. There is no occasion for conscious, open, affirmative corruption for which some one may be sent to the penitentiary when the same thing can be accomplished by that unconscious and subtle influence for which there is no punishment and which may even be justified by good people. Suppose every lawyer in the legislatures of the country or in Congress were in the employ of those great business interests engaged in interstate commerce. What do you think would be the necessity of employing lobbyists in order that no laws seriously affecting interests might be passed? A member of Congress is in an indefensible position who is called upon to legislate concerning those matters in which his clients may have an interest and which may concern them vitally. The man who would be permitted to walk into my office in Washington as my client, paying me a large retainer, and in after months sit down to argue against a bill which has come up for consideration would have a vast advantage in impressing me with his views over the public, the far removed and wholly impersonal public who pays me nothing more

than my board and seldom calls at all. Men do not give large retainers to men engaged in public service in order that these men may more thoroughly look after the public interests and out of sympathy with the small salary which they get. They give them because they expect them to be amenable to reason in an emergency, and in order that they may be sufficiently conservative in not yielding to that radicalism which takes alone into consideration the public interest.

You would impeach a judge who would consult with a client over a decision whether the decision affected him or not, even a discussion of the wisdom or unwisdom of such a decision. In fact, you would impeach a judge who dealt in a business way with litigants before his court. A few sessions ago we had the painful duty imposed upon us of unfrocking a federal judge. You may think it an easy thing to do, but whatever your convictions as to the necessity, you will move on to a performance of that duty with reluctance and pity. I do not hesitate to say that in the realm of strict morals, in the matter of correct public ethics and of true and upright public service, the judge thus unfrocked was guilty of precisely the same offense and no other and greater than that of the legislator who draws a salary of $7500 a year from the government and $25,000 from some client, and flatters himself that he can thread his way with honor and a clean conscience between the public interests and the antagonistic demands of private interest.

But let us concede, for the sake of argument, that he can successfully thread his way and satisfy his conscience, and let us pass over the structure of the conscience and seek not too closely to inquire how it arrived at its present structure. Still there is another proposition almost equally grave. Next to efficient and conscientious public service is the prerequisite of the confidence placed in that service. Next to the virtue and worth of the law

that is written is the faith of the people in the law and in those who have made it and who are to administer it. This government rests almost entirely upon the confidence which the people have in it and in those who administer it. Without that confidence the government could not operate or long maintain itself. If a legislator should feel that the rights of some great corporate interests were being unjustly assailed, if he should feel that some law which seemed to favor interests then under public censure was entitled to his support, he would be perfectly powerless to be of any service to them if it was known that he held a retainer from those engaged in a similar kind of business. In other words, it is just as important that the legislator be free from entanglements and those associations which seem to direct his actions in order that he may do justice to the business and corporate interests of the country as that he may do justice to the public. If he feels called upon to make a fight for the rights of those under public censure I cannot imagine his being fitted for that fight unless he is wholly disengaged in every conceivable way from any business or personal interests in the result.

I venture to prophesy that the people will in due time insist that their representatives in Congress shall stand as free from the relationship of client and attorney with reference to all those matters upon which they are called to legislate as now characterizes the great tribunal which passes finally upon the constitutionality of the laws which we make. There is a large class of professional business wholly disconnected in every way from the public service and which the public service will not affect one way or the other, and as to this business there is no reason why a lawyer, if he finds time, may not enjoy the remuneration which comes from attending to it. In fact, it may well be argued under the present compensation allowed to Senators and Representatives that such work is essential in order that a man may clothe and educate his

family. But with all that class of professional business which deals directly with those subject matters concerning which we legislate, the lawyer in public service must consent to be divorced wholly and completely.

An interesting and in many respects a remarkable debate was held in the English Parliament some time past on the Marconi affair. The relation of certain members of the cabinet to this business enterprise threatened the life of the ministry. The brilliant prime minister, speaking with unusual gravity and with manifest feeling, and with even more than his usual clearness of thought and precision of language, said:

> There are certain principles, certain rules which are rules not only of morality but of common sense and are beyond dispute. . . . . The most obvious is that ministers ought not to enter into any transaction whereby their private and pecuniary interest might even conceivably come in conflict with their public duty. . . . . No minister ought to allow or to put himself in a position to be tempted to use his official influence in support of any scheme or in furtherance of any contract in regard to which he has an undisclosed private interest. . . . . No minister ought to accept from persons who are engaged in negotiation with or seeking to enter into contractual or proprietary or pecuniary relations with the state any kind of favor.

Again he says:

> Such persons should carefully avoid all transactions which can give color or countenance to the belief that they are doing anything which the rules of public obligations forbid.

These rules apply with tenfold effect when the relation of client and attorney is involved. We should not attribute the timid and ineffective, undigested and unconstructive legislation of these days to affirmative and specific corruption as some seem to do—that seldom occurs and never to the extent that it of itself would materially affect legislation. We should attribute it to that to which it is due, to wit, men do not set themselves apart and dedicate their intellectual powers to the public service. Public service—official life, is an incident in the career of the American citizen, a stepping stone for

youth, an adornment for old age. The great, central, controlling, absorbing thought is that of acquiring wealth, either through professional or business channels, and that dominates and directs and shapes our life as a people. At some time or other men choose to pass in and out of the public service, but even in those brief years they give but partially of their time to the public. We flatter ourselves that a few years incidentally bestowed will enable us to master the vast problems of the age, that devotion and concentration of purpose and thought are unessential, that the greater portion of our time may well be given to the dominant motives of modern society, to wit, the making of money. The result is that while we succeed marvelously well in the business world we legislate in that halting, makeshift fashion which leaves our statute books crowded with incomplete and undigested laws, and those questions, the proper solution of which means no less than the preservation of our institutions, are pushed aside from day to day and from decade to decade.

Our government is the last best fruit of civilization. The principle upon which it is founded has now traveled its way around the globe. In its supreme power the humblest born may ultimately share, and when administered in harmony with its purposes and its design, the proudest and the strongest must obey its mandates. It neither circumscribes genius nor ignores the ungifted and the weak. Status has no recognition in the scheme of its being, but rather energy, change and progress everywhere. Life, liberty and property, in the order named, are the supreme objects of its care, and nowhere on God's footstool have men so universally shared the blessings of those guarantees and to no other country do men crowd in such throngs in order that they may share them. In its whole vast fabric from turret to foundation stone there is no place where special privilege or monoply may with safety rendezvous save by the connivance or

indifference of the people or the neglect or cowardice of their public servants. Those who declare otherwise declare so in ignorance of the principles of the government under which they live, or because they have not the courage to assail the wrong, and forsooth, in sheer incompetency and unworthiness, lay their faults upon the government—"as if we were villains by necessity, fools by heavenly compulsion."

But the whole scheme, the whole stupendous affair, its efficiency and its strength, rest at last upon the shoulders of the individual citizen. The entire structure has no other guarantee, no protector save an enlightened public opinion. We can make up our minds once for all that if we are not willing to make the sacrifice in time, thought and means by and through which citizenship is kept up to the highest standard of intelligence and physical well being, and by and through which the powers of the government are exerted for the general welfare, then while we may have some form of "organized hypocrisy," some shambling pretense of a government, we will not have a republic in fact—a free, wholesome, uncontrolled government having its well springs of national purpose and power in the esteem and affection of a loyal and devoted people. We can make up our minds that unless we come to recognize that in office or out of office every citizen is a public servant and owes something in time, thought and effort to his country and state and government, unless we are willing to step aside from the gathering of wealth a portion of the time and look in upon the condition of our laws, of our institutions and the needs of society, unless we understand and live up to our understanding that a truly free government is a living sacrifice, we must prepare to live under a government managed and directed by the selfish few for the many. There are those who seem honestly to believe that if a man can only succeed in getting himself born, that is the last exertion he will ever be called upon to

put forth; the state will do the rest. But the state in all its strength, in all its plans, can only go out to meet the citizen coming in; it can only furnish the instrumentalities which he in good faith shall use.

Many plans are proposed in these days to bring the government closer to the people. Some of these plans will have the effect proposed. Some will, in my opinion, remove the government not only beyond their control but more and more beyond their concern. That which tends to make government machinery cumbersome, heavy and expensive will in the end estrange people from its operation. But the danger is not after all that democracies are given power to decide, as some so much fear, but that decisions are made in indifference. The danger lies in the fact that while good men and women are busy about their private affairs, engrossed with personal concerns and therefore absent from the polls and disregardful of public affairs, those seeking purely selfish ends may seize these facile instruments of popular power and use them solely for their aggrandizement. The initiative and referendum, even if admitted to be grounded in sound practice, will work just as well for an organized band of political vagrants as they will for the best men and women in the world. If the latter are absent and the former present it will be no different in the final result than if we were the creatures of a hereditary oligarchy. No scheme of government, no dream of popular rule can work or come true with individual initiative, individual responsibility and individual sacrifice left out. Any scheme whch dulls the initiative of the private citizen or lulls him into indifference to the public interest upon the theory that in some way and somehow the plan will itself bring wisdom and justice in public service and prosperity and well distributed plenty is a dangerous delusion. Any political philosophy which seems not to demand sacrifice of time and thought, which seems not to require men to step outside of their private in-

terests and away from their professional obligations and to look with an unselfish view upon the public welfare, and pay toll in thought and high purpose as well as taxes to the government, will never be anything other than the tangled and deluding ensnarement of demagogues and dreamers, to the ultimate humility and undoing of the people. No other form of government registers so sensitively and so accurately the weakness and strength, the vices or virtues of the individual citizen as ours. And none, therefore, finds perpetuity so completely wrapped up in his individual strength and patriotism.

The lawyer is in the truer and broader sense a public servant. He secures his privileges to practise his profession from the state, he depends at last for his success upon the favor and esteem of the public, while his studies and researches lead him to the very beginnings of government to familiarize himself with the sources, the limitations and jurisdiction of sovereignty. From the beginning he has stood with firmness and remarkable vision about the birth scenes of human rights. The great charters of human freedom are in his handwriting, the great statutes of justice and equity are of his shaping and the noblest institutions of the human mind bear the impress of his genius. Romily and Selden, Coke and Mansfield, Otis, Hamilton, Jefferson, Madison, Marshall, lawyers and statesmen, and thousands who might be named with them, call us away from the purely personal pursuits of individual gain and suggest greater emoluments and more permanent laurels. We as a profession owe a vast amount to our age and time; the public has a right to expect much at our hands. These are difficult problems which the human race is now seeking to work out, involved, complex and of tremendous moment. In them are the profoundest questions of government and law—does not the conflict call for volunteers, and will a profession which has graced with its learning and its

leadership every conflict yet waged for better government and for higher ideals succumb to the sodden pursuit of wealth and ease while the battle rages? We look upon the great battles of our two great wars and speak of the sacrifices which those men made in order that this government might be established and preserved. We know, too, that should such a crisis come again men would crowd the camp for enlistment. But will you argue with me when I tell you that there is a brand of courage even yet more incomparable, a finer, rarer fiber of manhood, that courage, that manhood which amid selfishness and criticism and in spite of personal interest, and at the risk of personal aggrandizement, with neither fife nor drum nor pomp nor circumstance, the long year through fight the subtle, persuasive, sometimes vindictive and always active forces which seek in civil life to encompass and control to selfish and low ends the instrumentalities and forces of free government, or those who on the other hand in madness and folly, in their selfishness and self-seeking would wholly shatter and destroy the freest and most efficient government which in God's providence has yet blessed the earth?

In anything I have said I have not had in mind the discrediting of the great profession of which I am proud to be an humble member. Neither has it been my intention to criticise or discourage any particular plan or movement which have for their ultimate purpose the holding of the powers of government more completely within the hands of the people. In so far as any plan accomplishes this I heartily endorse it. I have only sought to accentuate amid all plans and schemes there must exist the vital and indispensable element of personal initiative and personal responsibility and personal obligation. No scheme of government can succeed unless the citizen understands and willingly discharges in the fullest sense his obligation and responsibilities to society and to the government. With a strong, virulent, self-reliant

citizenship we may face the future with calm and assurance. And it is as an appeal to this feature of power and responsibility that I have spoken in an inadequate way, but with sincerity, to the members of that great profession some of whose most brilliant minds adorn the Bar of every commonwealth of the union.

## FACTORS IN LAW ENFORCEMENT[1]

With the twin agents of social control, law and public opinion, diminishing in strength and prestige, to what can we turn? Are there other forms of control that offer more promise in a dynamic time? If so, they must be essentially different in their nature and appeal. Law and public opinion are similar in more ways than those already mentioned; their greatest similarity—and at the same time their greatest weakness—is that they are *controls from without.* Now, granting that external controls are necessary for some people all of the time, and for all people some of the time, and granting also that in our congested city life many regulatory laws are necessary for all people all of the time, it is indisputable that control from without is not and never can be the highest type of control. The most effective types, those which yield the greatest social gain at the least social cost, are the *controls from within.*

One of the two great inner controls is *education,* including not only the more formal education of young people in schools, but all the willed processes by which society seeks to improve the intelligence and social viewpoint of all ages and classes of people. Now, this statement in itself implies nothing new, for we have been cultivating the field of education for centuries, and it has yielded a vast harvest of social wealth. But in recent years we have not been content with the crop, and each year we are becoming less so. It is as though the yield

[1] From article by Ray Erwin Baber, Department of Sociology, New York University. *Social Forces.* 8:198-208. December, 1929.

had failed to keep pace with the growth of need. It is this increasing lag of performance that is being so anxiously scrutinized by educators.

At this point the social sciences are making new assurances that they can really "educate" a man by giving him, in addition to his general and technical knowledge, the "social point of view" necessary to make of him a good citizen. Lester F. Ward, the first eminent American sociologist, based his whole theory of social progress upon universal education, making for it a plea that has not been excelled. The key to his *social telesis* was widely diffused knowledge, but a certain kind of knowledge that understands social relationships and social laws. He maintained that the ills of society can be vanquished only by such knowledge, for where ignorance is rife, exploitation and all manner of social injustices flourish.

We have in this country today a commendable amount of education, though its distribution is faulty. On the face of it "compulsory and free" education seems to extend man's rightful heritage to all. Yet such is not the case, for while we have given some educational opportunity to all, the amount given to the fortunate few has so greatly increased that the gap between the best educated and the most poorly educated has been diminished far less than it appears. It is as though we had pushed upward the whole social hierarchy without greatly changing the relative positions of the different classes. This of course allows exploitation to continue.

But, while the social sciences have little voice in the *amount* of education to be given, they have considerable to say about the *nature* of it. And in spite of their overenthusiastic claims, never fully paralleled by results, they are performing a great service. Their goal has been primarily a new viewpoint, a *social* viewpoint which make the individual feel that the social welfare was worth sacrificing for. Even though still relatively in

their infancy, the social sciences have done much to clarify social relationships in a complex society. They have taught men to see through the maze of business and professional dealings and to connect social cause and effect, no matter how remote the one seems from the other; they have pointed out the direct and indirect effects of social as well as anti-social conduct; they have learned to diagnose the diseases of society, as well as to stimulate its healthy functions. They are changing from well-meaning but rather superficial methods to equally well-meaning but scientific methods, and the results have in general been good.

But we are still not satisfied with the crop. There still seems to be something lacking. *Reliability of conduct* in all sorts of life situations is an accurate index of socialization, but in spite of the rapid growth of the social sciences reliable conduct is not becoming sufficiently general. Various causes contribute to this situation. One may be that in the haste to become "scientific" certain of the social sciences have missed the way, and have passed by, without recognizing them, factors just as real and meaningful as those pursued. In some cases this has made untruth appear to be truth, as in the extremely mechanistic view which practically dismisses *responsibility for conduct* from human life. Such a doctrine, if widely accepted, would have very disastrous effects. Perhaps another cause of short performance has been the tendency of the social pathologist to become so absorbed in locating the sore spots of society that he forgets there are strong, healthy parts capable of further development. L. P. Jacks has furnished us a wholesome antidote for an overdose of social pathology. He insists that a constant consideration of society's ills is depressing, and that the thoughtful citizen should turn to the wiser course of seeking out "the sources of existing vitality" in society and strengthening them by every means in his power.

Still another reason why the social sciences may fail to be generally effective is their disinclination to include the element of value so necessary to reliable conduct. *Moral teaching* has come to be shunned, either as bordering too closely upon religion or as being largely outside the scope of scientific knowledge. The first of these charges is true, for every great religion has been tied up more or less closely with a system of morals; the second is clearly untrue, for to declare this vast field of reality to be impossible of scientific approach is to display either bias or ignorance. For as a matter of fact, we do know a great deal about morals. We were raised among them, we have studied and classified them, and have even sought out their origin. They affect our lives from infancy. We teach them in the home and in such organizations as the Boy Scouts and Girl Reserves, though our methods could be immeasurably improved. But when it comes to including moral teaching in our school curricula we seem to be ruled by some strange inhibition, though we are willing enough to turn over to the schools all other responsibilities possible.

But the question of moral teaching is demanding increased attention. In conventions of educators all over the land one finds a growing concern and a steady search for some way of giving moral instruction that will be acceptable to all. For one may have a thorough knowledge of economics, sociology and political science, but if he be lacking in what Jacks so aptly calls "social valor" he is not well fitted to be a citizen, that is, he is not truly educated. In this social valor there is found not only the courage so central to right, action, but also a strong sense of *trusteeship,* the very core of social conduct. No one has more clearly expressed this challenging ideal than has Jacks in this stirring passage:

> Think, then, of some persons known to you—and such persons are known to most of us—in whose hands you would feel your own interests to be perfectly safe, a person incapable of betraying your trust, or exploiting it to his own advantage, and you

have before you the very ideal of citizenship which all methods of education . . . should aim at realizing; no man can be accounted "educated" unless he be a man whom his neighbors can trust, the type needed, not only in the high places of power, but in every rank and level of industrial activity, in every workshop or office where goods are produced or services exchanged. Difficult—who doubts it?—but not to be called impossible until a resolute attempt has been made to train citizenship on those lines, which has not been done as yet.[4]

Such a social philosophy must not be handicapped by being confined to the college and university, which only a few enter. To influence the average citizen it must be extended to the high school, and, in suitable form, even to the upper grades of the "common school," for only thus will it ever pervade the thinking of the masses. And it should not stop even there, for ofttimes the less formal education which one receives outside the school outweighs in influence that received in the classroom. The pulpit, the press, the forum, and the home can contribute greatly to the success of such an educational policy. Without their help formal education cannot hope to accomplish the task; it can lead the way, but it needs the vigorous support of other agents.

Among the limitations of higher education as an agent of social control there still remains for consideration what appears to be an inherent inconsistency. At the same time that we are lauding the social sciences, and insisting that those who pass through our colleges should have a thorough grounding in them, we are making education so specialized that it is becoming increasingly difficult for many students to include in their crowded curriculum *any* of the social sciences which prepare most definitely for citizenship, to say nothing of becoming "well-grounded" in them. Not even the growing tendency to postpone specialization until a certain amount of "general" education has been acquired meets the situation, for in the years of pre-specialization the "required" courses which directly prepare for the specialization that

[4] Jacks, L. P. Constructive Citizenship, p. 64-65.

is to follow are so numerous, and the "electives" so few, that the postponement brings a very limited gain in opportunity for courses dealing primarily with citizenship. The increasing specialization in the work of the world means an increased demand for specialized training, which in turn means that the social sciences may find great difficulty in reaching effectively the majority of students.

The second great fashioner of conduct which bases its power on inner control is religion. One cannot study that host of dauntless souls, up through the centuries, whose religion transformed their lives from weakness to strength and inspired them to deeds that surprised even themselves, without acknowledging the tremendous power of religion in molding the lives of men into worthy patterns. The last quarter of a century has seen emerge a *socialized* religion (singularly like that of the Hebrew prophets and of the Gospels) which bids fair to have more real strength than religion has had for many a century. For in so far as the sanctions of religion change from the outer to the inner, its *real* strength emerges. The old legal religion of strict accounting was often harsh and unyielding, even conforming at times to situations of grossest injustice; the new socialized religion is based upon the idea of universal brotherhood and the sacredness of all personality, making it impossible for it to condone injustice, or anything else that would belittle man or prevent the fullest development of his personality. But it is based also upon something more,—an adaptive intelligence, without which religion is helpless to minister to the abundant life.

It is not within the scope of this discussion to set forth the strength or weakness or religion *per se,* but merely to measure its value as an agent of social control. Can socialized religion secure a wide enough spread to make it a universal factor of control? There is considerable evidence that it can. If there is at present a

ground-swell of revolt against the trend of irreligion, it is indicative of its potential power. This groping for the guy-ropes is evidenced by the tremendous volume of religious books coming from the press, by the nature of contributed articles and the editorial tone of the better secular magazines, by the interest in religion disclosed in conversations among thoughtful men everywhere, and finally by the revitalized program of churches and other religious organizations. Should this socialized religion find wide acceptance it might become the strongest of all controls. It penetrates where law cannot go, it carries a conviction which public opinion cannot give, it may even excel its closest running mate and fellow-producer of inner controls,—education.

In spite of the fact that religious education, holding to antiquated and inefficient methods, has lost much of its opportunity and fallen far short of its possibilities, it has been an untold force for good when intelligently employed. On the whole there is some evidence to indicate that the youth from Christian homes and with the best training of Christian institutions have gained a level of *social* performance not attained by those of lesser privilege. Somewhere in their training they learn to rate conduct in terms of social gain or loss. They also learn to stand under fire. Conduct is linked inseparably with material changes such as population movements, inventions, methods of production and distribution, as well as with the continual changes in the psychic forces all about us. The effect of these changes on youth is large. The anonymity of cities, the intricate, indirect methods of business, the opportunity to amass vast fortunes at the expense of others, the rapid increase of luxuries, and similar factors are setting loose in the world today a spirit of unrestraint and exploitation that begets suspicion, hate and strife.

The genius of socialized religion is seen in its method of meeting these conditions. It meets them not by force

from without, but by an active good-will which *changes the desire from within.* We cannot force men and women to be good; we cannot raise enough money or hire enough men to watch them. Society cannot operate with half its man power watching, club in hand, the other half. Satisfactory operation, whether of an industrial plant or a whole society, comes only through active good-will which recognizes the rights of *all* as sacred. This is the epitome of the Christian way of living.

We have surveyed briefly *law* and *public opinion,* the two major controls from without, and *education* and *religion,* the two major controls from within. We have seen that the two former appear to be losing their power, but that the two latter, while far from functioning perfectly, hold within them such proven possibilities that their future is encouraging. The strength of the two outer controls diminishes automatically as the urbanization and complexity of society increase. It is conceivable that society may find some way completely to rejuvenate law and public opinion in a highly urbanized society, but that time seems far distant. Even education and religion are affected somewhat adversely by urbanization and complexity, but to nothing like the same extent as are the other two. They have no *automatic* checks. They are made up of different stuff, and are built on entirely different foundations.

What, then, is a reasonable course to pursue toward these four agents of social control? If two are definitely losing ground, the third just as definitely gaining, and the fourth, after a temporary setback, again progressing steadily, would it not seem logical to throw the greater weight of our support to those of greatest promise? Law is expensive and inefficient. In spite of the half-billion dollars we spend each year in making laws and attempting to enforce them our annual crime bill (according to the Institute of Economics) reaches the stupendous figure of $5,000,000,000. A part of this huge outlay on law has

been fairly effective. Many good and necessary laws have been passed, and in some cases well enforced. But have the 62,000 laws which Elihu Root says were passed by Congress and the state legislatures in a recent five-year period made us "good"? Have they, or the attempted enforcement of them, given us a wholesome respect for law, and a cheerful, sincere desire to so shape our conduct that we will avoid breaking even the least of them? Have they made us enthusiastic believers in the efficacy of law as a method?

Clearly there are better ways for most folk than force or threat of force; there are better ways than public disapproval or threat of approval. The negative forces in life cannot compare with the positive; ofttimes they even depend on the positive forces for what strength they have. When the inner controls are strong the socially approved outer controls are also more efficient. When men learn to control themselves group control is easy, and becomes merely social guidance. We are at last coming to perceive this simple truth. We are beginning to turn to the inner forces, as yet little understood, with a new faith in what we shall find. And once we concentrate our thought and effort on these little developed resources, we need not long be novices in their use. We shall learn to be scientific in the truest sense of the word, in this field as well as in those already more fully occupied.

In summary, *there can be no social control without self control,* and the two agents at present most efficient in generating this socially precious force are education and religion. It should logically follow that when they are given our most thoughtful support society will go forward with a quicker step. If better controls are later discovered, a scientific attitude bent on social effectiveness will guarantee their adoption; until that time the same attitude will seek to use the best that are at hand.

## WAY TO WAR ON CRIME[6]

We believe that there is no greater service that can be rendered to the United States than the starting of a nation-wide movement that will effectively prevent crime; that will secure the enforcement of the criminal law; that will once more restore to the American people the administration of justice; that will put an end to the prevailing opinion that there is one law for the rich and another for the poor, and that it is only the poor who suffer the consequences of their misdeeds. Some of the great foundations have here an unprecedented opportunity for public service.

We propose that the forces of law and order of the country shall be mobolized in a nation-wide war against crime. And the first step in that campaign is the elaboration of a program of action which will deal adequately with the needs of the situation.

A program that will effectively cope with crime in the United States will lead into the fields of legislation, law enforcement education, and research.

If crime is an organized business, there must be organization to put down crime. There must be in all our cities an organization on the "crime job" every day in the year, whose sole business it is to study crime and to see that the laws against crime are adequate and are properly enforced by the courts and by the public officials.

A program to deal with crime adequately should therefore seek to secure the enforcement of the criminal law by organizing in each city of any size a *local law enforcement body, or crime commission,* supported by private funds and dissociated from governmental activities, which will *study and present* to the community *the facts about crime* in that community; *study the adequacy of the existing machinery—legal, judicial, and administra-*

[6] From article by Lawrence Veiller, Secretary of the Committee on Criminal Courts of the Charity Organization Society of the City of New York. *World's Work.* 51:601-9 April, 1926.

*tive—to cope with crime; organize public sentiment to make that machinery* in all respects *adequate* to secure prompt and sure enforcement of the criminal law; *carry out a legislative program* such as is here suggested, with local modifications as may be desirable; when such legislation has been secured, *aid in its enforcement* in a constructive way; *strengthen and uphold the hands of honest and capable officials* in enforcing the laws against crime; and *watch closely the administration of the criminal courts, the public prosecutor's office, and the police,* so that evils as they arise may be promptly checked.

The most essential step to be taken is the improving of the machinery of justice, so that justice shall be swift and sure. To bring about that result we must overcome certain evils which have been very fully discussed in previous articles.

The interminable delays which are now made possible by our laws through which the criminal so often escapes justice, must be done away with. The chief and simplest method of doing away with them is to remove the incentive by keeping the criminal with a known record in jail until his case is tried. The Constitution of the United States and those of all our states provide for swift and speedy trials for all offenders. It is the last thing the criminal wants, but it is the first step to take in improving the judicial machinery. While much can be accomplished by refusing bail to known criminals and by keeping them in jail until their cases are tried, it will undoubtedly be necessary also to enact laws which will prevent the constant continuances of criminal cases and require their speedy trial. Practically all of these evils could be done away with without recourse to legislation if our courts changed their attitude toward requests for delay.

The avenue of escape from his misdeeds, which the criminal now finds so wide open by taking advantage of the technicalities of the law, must be closed. Legislation must be secured looking toward a simplified practice that

will make it plain to all of the courts throughout the country that it is the will of the people that this setting aside of convictions because of technical defects in the trial shall come to an end, and that justice shall be done. The adoption of one simple statute along the lines of the English procedure, that has already been described, will in itself go far toward remedying this evil.

The means by which criminals now drag out their cases for months and often for years through constant appeals to higher courts, thus often defeating the ends of justice, must come to an end. The right of appeal no one wishes to deny, even to the professional criminal, but one appeal, and one only, is entirely sufficient. If justice can be done in England under such a system, it can similarly be done in the United States. If the criminal once realizes that he cannot through pettifogging methods drag out his case interminably and have it set aside by constant appeals from one court to another and then sent back for a new trial, resulting as a rule either in a reversal of his earlier conviction, or in a greatly modified sentence, he will then understand that he must pay the penalty for his misdeeds. There must be an end to these frequent appeals and to all re-trials. Let us adopt the English system, which has proved so successful.

We need to put an end to the practice of the higher courts reversing the lower courts upon technical grounds. Let it come to an end. And let the only ground for a reversal be, as it is in England, the fact that the defendant's interests have been prejudiced by some omission in the lower court or by admission of evidence or statements that should not have been made and that may have prejudiced his cause; but let such reversals be only upon the ground that a substantial miscarriage of justice has occurred and upon no other.

The present amazing system by which professional criminals are promptly set at liberty on bail and left to ply their nefarious trade, often committing new crimes while still awaiting trial on earlier ones, must come to an

end. Probably no one thing will so reduce crime as the simple expedient of keeping the known criminal in jail until he is tried. To do this means no more than the adoption of the English system. In a word, make it a crime to indemnify bail. If the old offender cannot pay some one to bail him out, he will not be bailed out. The state should stop granting charters to groups of men to defeat justice. In effect, that is what happens when a surety company bails out a criminal, no matter what his offense or no matter what his record, provided he is willing to pay their fee. This certainly must cease. Along with it let there be a strict enforcement of the laws with regard to bail. Let a man be bailed only when some responsible citizen is willing to be personally responsible for his appearance, and when he fails to appear let bail be promptly forfeited and the property seized. Let sureties be carefully examined *before* they are accepted, and let the evils which have been disclosed in these articles, of "phony bail," of excessive valuations, of worthless property being given as bail, come to an end.

The present long-drawn-out, tedious, and foolish method by which juries are selected in our criminal trials should stop. There is no reason for it except the desire on the part of the criminal to select a jury of his own choosing, who will be either friendly to him or so lacking in intelligence that a fair verdict cannot be rendered. The new method of selecting juries, by which they are secured in a few moments, beginning to be put into practice in the federal courts, must be extended to all of our state courts. The decision as to who shall serve on a jury must be taken away from the criminal's counsel and vested in the hands of the judge, where it properly belongs.

At the present time the contending attorneys, and chiefly the defendant's attorney, control our trials; the judge in most cases sits powerless to direct the trial into its proper channels, to offset perjury and misleading testimony. Under such conditions one might almost dis-

pense entirely with the judicial function. It is time that this preposterous system should be ended. The beginning which has been made in the federal courts should be extended to all of our state courts. The judge should once more occupy the position that he occupied formerly and should be the judge—in control of the trial and empowered to check all attempts to hoodwink, to mislead, to thwart the ends of justice—as he does in England.

The time has come when murderers should cease to go scot-free on the defense of insanity or mental defect, ingeniously presented by counsel and supported by a host of retained so-called technical "experts." An insane murderer is even more dangerous to society than a sane one. If the protection of society requires the death penalty for murder, it would seem that it should apply equally to one who commits murder even though insane, for he is just as dangerous to society in the future and should equally be destroyed. Means should be found, too, of preventing the abuses which now exist with regard to the testimony of experts. The state itself should exercise control. Through the state's experts questions of fact as to the sanity, or insanity, or mental defect, of a defendant —where this is a material question—should be determined by the state and not by "experts" retained by the defense.

If there were no lawyers willing to aid criminals through questionable methods and avail themselves of the tricks and devices which the law permits, in order to free their clients from the consequences of their wrongful acts, it would be impossible for the average criminal, once apprehended, to escape punishment. There must be radical change in the criminal bar. The legal profession owes it to itself to set its house in order. It will not do for the bar to rest quiescent, as it does to-day in all our cities, under known abuses of a flagrant character until some specific instance is presented to it so scandalous that it requires action.

Why should not the bar take the initiative and be vigilant in seeing that no member of the bar is allowed to practice who resorts to questionable methods? And why should not the bar association of every important city in the country permanently organize with committees of its own members—and with a paid staff where that is necessary—to obtain knowledge of the methods employed by the public members of the bar practicing in the criminal courts, so that it may quickly act upon any abuse that is disclosed? We prophesy that when such procedure is once carried out, the abuses in the criminal bar which now are so flagrant will soon some to an end.

Let practice at the criminal bar be restored once more to respectability. Let the criminal law be taught in our law schools. Let every member of the bar serve his turn in practice at the criminal bar. There is great need of the services of the very ablest men in the legal profession in defending men in all our cities who are without means to retain adequate legal defense and who need it—and who ought to have it. The knowledge which the leaders of the bar will thus obtain will prove invaluable to them and will prove a check upon evil practices in the administration of justice.

Another of the reasons for failure in the administration of criminal justice in the United States is to be found in the lack of efficiency and integrity in the office of the public prosecutor, in the fact that the office is generally a political one, that the public prosecutor's staff is often incompetent, that it has no keen sense of public responsibility. Too often the district attorney with his eye upon reëlection is playing to the gallery, seeking public acclaim in some sensational case, which he often tries in the newspapers, and too often neglects the mass of cases which clamor for attention, but which the public are not interested in. The whole system of the public prosecutor's office needs radical revision.

Whether the people of the United States can ever be brought to adopt the English system, in which there is no district attorney, but the great mass of cases are tried in turn by members of the bar, called upon for that purpose in specific cases by the Director of Public Prosecutions, we hesitate to say. In England such a system works and works admirably. It has the great advantage of preventing the members of the criminal bar from viewing their work solely from the point of view of the criminal. It gives them a balanced judgment and attitude, for they are prosecuting criminals quite as much as they are defending them. There is, consequently, no class of lawyers who are day in and day out defending criminals and doing nothing else, as in this country. Whether the people of the United States can be led to see the advantage of such a scheme, whether it could be made to harmonize with our political institutions is a question. I, for one, would like to see it tried. On the whole, I believe that the dangers that might be inherent in it would not outweigh the benefits to be derived from it. In any event, there must be radical reorganization of the public prosecutor's office and its methods of work, if we are to have successful administration of the criminal law.

And, finally, me must divorce politics from the administration of criminal justice. We must make all our criminal courts, courts of justice once more, where justice is really done, where there is no longer the buying and selling of indulgences, where no political favors are done, where not only the Bench but the whole staff are appointed to office, and hold that office solely for reasons of efficiency, and who are thus able to administer justice with an eye to the one purpose of doing justice. Politics must equally be abolished from the police departments and from the public prosecutor's offices.

If the criminal is to be adequately dealt with under our laws we must differentiate between the professional criminal and the casual one, between crime that is prac-

ticed as a business and crimes of emotion or passion. The professional criminal must find the career of crime no longer profitable, and he must also find it so dangerous that he will hesitate to embark upon it. It must be made so difficult for him to operate that he will cease to operate. This is quite possible, and the two methods by which this result can be achieved are quite simple. They may be stated as follows:

*The criminal must be deprived of his tools;* and the chief tools are the pistol and the automobile. Until we deprive the criminal of his pistol, we cannot expect to reduce crime materially in this country, and murder will flourish as it does to-day. But, with the manufacture of pistols at an end, with all existing pistols confiscated, with no more pistols available in this country, crime will be so reduced as to enable America to hold up her head and take her place among other civilized countries. The method by which the criminal is to be deprived of his pistol presents some difficulties, but no insuperable ones. If every state in the Union should pass a law prohibiting the manufacture, sale, and possession of pistols, revolvers, and their cartridges, and then proceed to enforce that law, there would soon be no pistols in this country. Failing such action, it may be necessary to seek federal relief; but the powers of the federal government are limited, and it may not be so well able to cope with this evil as are the individual states. We might make a beginning by disarming the civil population in those states where the possession of a pistol is today forbidden by law.

And then we should make it difficult for criminals to steal a motor car. This is not so easily done; but there are many ways by which the present facility with which motor cars are annexed for purposes of criminal operations could be greatly reduced.

Another important step in controlling crime is *the establishment of adequate central bureaus of criminal rec-*

*ords* in every important city and every state, and in Washington as a clearing house for the whole United States. How can we differentiate in our treatment of the professional criminal and the casual one when we don't know whether a particular offender is an old offender or not, because our system of records in most cities is so inadequate? Let such central bureaus of criminal records be established and in the most modern way. Let fingerprints be taken upon arrest of all persons charged with serious crimes, and if they are found not guilty let such fingerprints be promptly destroyed. No man's reputation is injured under those circumstances, nor are his rights invaded.

Let us return to the practice of punishing the criminal, from which we have departed. Before, however, we can make much progress in this direction *it will be necessary that the public* shall *change its attitude toward crime and criminals.* Let the press cease arousing a morbid interest in crime, and stop glorifying the criminal through sensational articles; and let the public become united in a demand for the punishment of the criminal and show more sympathy for the criminal's victims than for the criminal. The public must be made to realize that the protection of the community is of more importance than the suffering of one individual, who has brought his sufferings upon himself.

In order that crime may be punished and prevented the criminal must be apprehended. This means that *our police departments must be made efficient;* that they must be composed of men especially selected and trained for this purpose; that politics of all kinds must be eliminated; and that the police force of our cities shall become like the police force in England—a body of men upon whom rests the security of the community, men of high moral character and ability, who regard their career as an honorable one, and who are jealous of the honor of their profession, and who consider their service on that force

a contribution that they are making to the community and not merely a means of earning a livelihood. Let adequate and efficient police forces be established through our rural districts in order to cope with rural crime.

And let *a true probation system* be established throughout the country. Let there be an end of the present inadequate method by which probation is often practiced in name only. Let there be complete, thorough, and adequate investigation of every offender before he is sentenced, so that the court may know all about him and determine what is the best disposition to make of him, not only for the protection of society but for the offender"s welfare as well. Let the system of probation and the number of probation officers be adequate, so that every man on probation can be closely supervised and the present shadow of probation become an entity; so that the offender may no longer feel that probation is a joke, but realize that it means real control; and, finally, let probation be denied by law in all our states to the hardened criminal and to the men guilty of the more serious offenses.

And, above all things, *let us put an end to* the present preposterous system of *releasing hardened criminals on parole* after they have served a short part of their sentence. Let the criminal world realize, when the law says that men shall be confined in jail for a period of twenty years or for life—or whatever it may be—if they commit a certain crime, that the law means what it says, and that if convicted of that crime they will surely remain in prison every day of that time. The time has passed when the convenience and ease of the employees of our prisons can be allowed to take precedence over the welfare of society. The parole system should absolutely come to an end. There can be no effective administration of the criminal law so long as it exists. Let confinement in prison be once more a punishment, so that men who live by crime may actually fear it.

In order that justice may be administered once more and that crime may be diminished, there must be brought about a changed attitude of the entire nation toward crime and criminals. This means that there must be a nation-wide movement in that direction. Such a movement will carry on a campaign for a changed attitude toward crime by the public, by the Bench, by the Bar, and by the press.

The means of that education of the nation might be, by organizing local law enforcement bodies, or crime commissions, in every city of any size; by publication in the press, and through every similar channel, of articles on the situation; by constantly, upon all suitable occasions, bringing home to the public the true facts about crime; by addresses and documentation through Bar Associations, in law schools, in legislative halls—wherever information on crime may be needed; by enlisting in the campaign all organizations throughout the country that have a direct or indirect interest in reducing or preventing crime—judges, lawyers, women's organizations, insurance companies, bankers, railroads, chambers of commerce, the Church, etc.

The methods to be employed will naturally follow the lines of similar national educational movements, the technique of which is now so well developed and so well known as to need no restatement here.

If crime is to be successfully combated there must also be research as to the facts about crime, the effects of crime, and the causes of crime. Here there is opportunity of enlisting the interest of those persons who now see in physical defects of individual criminals the chief reasons for crime—who find in childhood complexes, in glandular defects, in bad early environment and lack of early education, an explanation often for the reasons to his present predicament and whom they look upon as patients sick with mental disease, to be placed in institutions for study and treatment.

Whatever view one may take of this aspect of the subject, there is undoubtedly much to be done in finding out the facts about crime, the effects of crime, the causes of crime. The field is unlimited; activity in such research, however, should not be deemed a substitute for those vitally necessary measures of reform which must be undertaken if justice is to be restored and crime is to be reduced.

If, to some, such a program seems a counsel of perfection, they should reflect that, were everything in it an accomplished fact, we should only have brought about in America conditions which in England are the customary routine of ordinary daily existence and have been so for many years.

That such a program, effectively supported and resolutely carried out, will accomplish the ends sought, we have no doubt. It is offered with a full realization that it is not complete; that there are undoubtedly other tasks to be undertaken; that, as such a movement grows and is tested in the light of experience, new phases of activity will develop; that it will naturally be modified in the light of experience.

It is offered with a full realization also of the magnitude of the task and the difficulties to be encountered. Nor it there any thought that these evils which have been slow in growing into being can be remedied over night. It will take time to bring about the results desired.

But, we submit, no matter what the difficulties; no matter what the cost; no matter what the demands such a program makes upon the services of public-spirited men; no matter how long the time that will elapse before it will be accomplished—we submit that the situation is one which calls for action. Unless something is done, and done soon, to check the rising of crime in this country, the very foundations of the country itself will be threatened. We must control crime or crime will control us.

## SOVEREIGNTY OF LAW[6]

The results of Mr. Hoover's special investigation of the reasons for law non-enforcement in the United States are likely to prove exceedingly interesting—provided, of course, the committee strays from the narrow pathway of routine legal methods and machinery into the wildwood of mass psychology.

Non-enforcement and non-observance of law have ever been the nemesis of institutions which fail to respond to new and vital conditions arising in the surrounding environment. When large numbers of citizens, or members, or communicants, pass from voluntary obedience to indifference or voluntary disobedience, the sources of this transformation of attitude can never be found in the individual but must be sought in the institution itself. Obedience to law marks a healthy spirit in the social body; non-obedience indicates that the body has become diseased.

An effective approach to the problem of the relations between citizen and state lies in consideration of the so-called "gangs" which have become organized in American cities. In practically every sense of the word, an active and effective gang is a sovereignty, a state, to its own members. It legislates; it maintains courts; it possesses at least the elements of an educational system; it determines such matters as the status of sex relations; it levies taxes; it protects its obedient citizens and punishes its traitors; it wages war and signs treaties of peace; it recognizes boundaries; it conducts foreign relations. Granted its successful continuance for a term of years, the gang evokes the psychology of patriotism and achieves the status of independent sovereignty among its peers.

Regarded only from within, the gang is a worthy and useful social organism, capable of manifesting, in rudimentary degree at least, the various attributes and func-

[6] Editorial. *World Unity Magazine.* 4:311-12. August, 1929.

tions of the national state. Emotionally and materially, it is that state in primitive form.

We overlook these simple facts because it is impossible for us to achieve the perspective of the gang member—our perspective visualizes the gang only as a sinister act of rebellion against the larger law of the land.

But it will be increasingly necessary for all well meaning people to overcome within themselves the traditional perspective by which every act of the national state is vested with true, complete sovereignty, and nationalism is considered to possess the status of finality.

From the viewpoint of humanity as a whole, the modern state is itself nothing else than a highly organized "gang" in sinister rebellion against the supreme order and welfare of the world. Its acts of warfare are murder; its education for the most part a betrayal of true human interests; its tariffs and immigration laws wholly arbitrary expressions of partisan policy and therefore in conflict with the fundamental laws of economics and international cooperation. While national states continue to break the universal laws of life, and justify the resulting political, economic, cultural and spiritual chaos, how can they expect from their own citizens that voluntary, whole-hearted obedience which exists only when the cell is a part of a healthy organism?

Thus it may confidently be expected that if Mr. Hoover's investigation goes far enough, it will lay bare the facts that national statutes are only valid when they exist as local applications of laws and principles controlling the welfare and vigorous development of humanity as a whole. Possessing this status, their observance and enforcement will be identical with those supreme moral and spiritual realities which alone can balance self-interest and social obligation on the part of individual men and women. Without it, national statutes are a defiance of reality, a source of chaos and an instrument capable of setting state against state once more, but for the last time.

# PART III

# LAW OBSERVANCE

## RESPECT FOR LAW[1]

I have accepted this occasion for a frank statement of what I consider the dominant issue before the American people. Its solution is more vital to the preservation of our institutions than any other question before us. That is the enforcement and the obedience to the laws of the United States, both federal and state.

I ask only that you weigh this for yourselves, and if my position is right, that you support it—not to support me but to support something infinitely more precious —the one force that holds our civilization together, and that is law. And I wish to discuss it as law, not as to the merits or demerits of a particular law, but all law, federal and state, for ours is a government of laws made by our people themselves.

A surprising number of our people, otherwise of responsibility in the community, have drifted into the extraordinary notion that laws are made for those who choose to obey them. And in addition, our law-enforcement machinery is suffering from many infirmities arising out of its technicalities, its circumlocutions, its involved procedures, and too often, I regret, from inefficient and delinquent officials.

We are reaping the harvest of these defects now. More than nine thousand human beings are lawlessly killed in the United States each year. Little more than

[1] From address of President Hoover at the meeting of *The Associated Press. New York Times.* p. 2. April 23, 1929.

half as many arrests follow. Less than one-sixth of these slayers are convicted, and but a scandalously small percentage are adequately punished. Twenty times as many people in proportion to population are lawlessly killed in the United States as in Great Britain. In many of our great cities murder can apparently be committed with impunity. At least fifty times as many robberies in proportion to population are committed in the United States as in the United Kingdom, and three times as many burglaries.

Even in such premeditated crimes as embezzlement and forgery our record stands no comparison with other stable nations. No part of the country, rural or urban, is immune. Life and property are relatively more unsafe than in any other civilized country in the world. In spite of all this we have reason to pride ourselves on our institutions and the high moral instincts of the great majority of our people. No one will assert, however, that such crime would be committed if we had even a normal respect for law and if the laws of our country were properly enforced.

In order to dispel certain illusions in the public mind on this subject, let me say at once that while violations of law have been increased by inclusion of crimes under the eighteenth amendment and by the vast sums that are poured into the hands of the criminal classes by the patronage of illicit liquor by otherwise responsible citizens, yet this is only one segment of our problem. I have purposely cited the extent of murder, burglary, robbery, forgery and embezzlement, because only a small percentage of these can be attributed to the eighteenth amendment. In fact, of the total number of convictions for felony last year, less than 8 per cent came from that source. That is, therefore, but a sector of the invasion of lawlessness.

What we are facing today is something far larger and far more fundamental—the possibility that respect

for law as law is fading from the sensibilities of our people. Whatever the value of any law may be, the enforcement of that law written in plain terms upon our statute books is not, in my mind, a debatable question. Law should be observed and must be enforced until it is repealed by the proper processes of our democracy. The duty to enforce the law rests upon every public official and the duty to obey it rests upon every citizen.

No individual has the right to determine what law shall be obeyed and what law shall not be enforced. If a law is wrong, its rigid enforcement is the surest guarantee of its repeal. If it is right, its enforcement is the quickest method of compelling respect for it. I have seen statements published within a few days encouraging citizens to defy a law because that particular journal did not approve of the law itself. I leave comment on such an attitude to any citizen with a sense of public responsibility.

In my position, with my obligations, there can be no argument on these points. There is no citizen who would approve of the President of the United States assuming any other attitude. It may be said by some that the larger responsibility for the enforcement of laws against crime rests with state and local authorities and it does not concern the federal government. But it does concern the President of the United States, both as a citizen and as the one upon whom rests the primary responsibility of leadership for the establishment of standards of law enforcement in our country. Respect for law and obedience to law does not distinguish between federal and state laws—it is a common conscience.

After all, the processes of criminal-law enforcement are simply methods of instilling respect and fear into the minds of those who have not the intelligence and moral instinct to obey the law as a matter of conscience. The real problem is to awaken this consciousness, this moral

sense, and if necessary to segregate such degenerate minds where they can do no future harm.

We have two immediate problems in government before us: First, to investigate our existing agencies of enforcement, and, second, to reorganize our system of enforcement in such manner as to eliminate its weaknesses. It is the purpose of the Federal Administration systematically to strengthen its law-enforcement agencies week by week, month by month, year by year, not by dramatic displays and violent attacks in order to make headlines, not by violating the law itself through misuse of the law in its enforcement, but by steady pressure, steady weeding out of all incapable and negligent officials no matter what their status; by encouragement, promotion and recognition for those who do their duty, and by the most rigid scrutiny of the records and attitudes of all persons suggested for appointment to official posts in our entire law-enforcement machinery. That is administration for which my colleagues and I are as fully responsible as the human material which can be assembled for the task will succeed. Beyond this, I wish to determine and, so far as possible, remove the sources of inherent defects in our present system that defeat the most devoted of our officials.

Every student of our law enforcement mechanism knows full well that it is in need of vigorous reorganization; that its procedure unduly favors the criminal; that our judiciary needs to be strengthened; that the method of assembling our juries needs revision; that justice must be more swift and sure. In our desire to be merciful the pendulum has swung in favor of the prisoner and far away from the protection of society. The sympathetic mind of the American people in its over-concern about those who are in difficulties has swung too far from the family of the murdered to the family of the murderer.

There is another and a far wider field than the nature

of laws and the methods of their enforcement. This is the basic question of the understanding, the ideals, the relationship of the individual citizen to the law itself. It is in this field that the press plays a dominant part. It is almost final in its potency to arouse the interest and consciousness of the American people. It can destroy their finer sensibilities or it can invigorate them. I am well aware that the great majority of our important journals day by day give support to these high ideals. I am making no criticism.

I wonder, sometimes, however, if perhaps a little more support to our laws could not be given in one direction. If, instead of the glamour of romance and heroism which our American imaginative minds too frequently throw around those who break the law, we would invest with a little romance and heroism those thousands of our officers who are endeavoring to enforce the law it would itself decrease crime. Praise and respect for those who properly enforce the laws would help. Perhaps a little better proportioned balance of news concerning those criminals who are convicted and punished would serve to instill the fear of the law.

I need not repeat that absolute freedom of the press to discuss public questions is a foundation stone of American liberty. I put the question, however, to every individual conscience, whether flippance is a useful or even legitimate device in such discussions.

I do not believe it is. Its effect is as misleading and as distorting of public conscience as deliberate misrepresentation. Not clarification, but confusion of issues in the public mind arises from it.

Our people for many years have been intensely absorbed in business, in the astonishing upbuilding of a great country, and we have attempted to specialize in our occupations, to strive to achieve in our own specialties and to respect competency of others in theirs. Unconsciously, we have carried this psychology into a state of

mind toward government. We need to regard the making of laws and their administration as a function of a group of specialists in government whom we hired for this purpose and whom we call public servants. After hiring them it is our purpose casually to review their actions, to accept those which we approve and to reject the rest.

This attitude of mind is destructive of self-government, for self-government is predicated upon the fact that every responsible citizen will take his part in the creation of law, and that he will also take his part in the obedience to law and the selection of officials and methods for its enforcement.

Finally, I wish to reiterate that the problem of law enforcement is not alone a function or business of government. If law can be upheld only by enforcement officers, then our scheme of government is at an end. Every citizen has a personal duty in it—the duty to order his own actions, to so weigh the effect of his example, that his conduct shall be a positive force in his community with respect to the law as law.

I greatly admire the independence and the courage of the American press. I sometimes feel that it could give more emphasis to one phase or another of our national problems, but I realize the difficulties under which it operates. I am wondering whether the time has not come, however, to realize that we are confronted with a national necessity of the first degree, that we are not suffering from an ephemeral crime wave but from a subsidence of our foundations.

Possibly the time is at hand for the press to systematically demand and support the reorganization of our law-enforcement machinery—federal, state and local—so that crime may be reduced, and on the other hand to demand that our citizens shall awake to the fundamental consciousness of democracy, which is that the laws are theirs and that every responsible member of a democracy has the primary duty to obey the law.

It is unnecessary for me to argue the fact that the very essence of freedom is obedience to law; that liberty itself has but one foundation, and that is in the law.

And in conclusion let me recall an oft-repeated word from Abraham Lincoln, whose invisible presence lives hourly at the very desk and in the very halls which it is my honor to occupy. He said:

> Let every man remember that to violate the law is to trample on the blood of his father and to tear the character of his own and his children's liberty. Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap. Let it be taught in the schools, in seminaries, in colleges. Let it be preached from the pulpit, proclaimed in the legislative halls and enforced in the courts of justice, and, in short, let it become the political religion of the nation, and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions sacrifice unceasingly upon its altar.

## LAWS AND MANNERS[2]

In order to explain this extraordinary title I must ask you to follow me in examining the three great domains of human action. First comes the domain of positive law, where our actions are prescribed by laws binding upon us which must be obeyed. Next comes the domain of free choice, which includes all those actions as to which we claim and enjoy complete freedom. But between these two there is a third large and important domain in which there rules neither positive law nor absolute freedom. In that domain there is no law which inexorably determines our course of action, and yet we feel that we are not free to choose as we would. The degree of this sense of a lack of complete freedom in this domain varies in every case. It grades from a consciousness of a duty nearly as strong as positive law, to a feeling that the matter is all but a question of personal choice. Some might wish to parcel out this domain into separate coun-

[2] From article by John Fletcher Moulton, (Lord Moulton) *Atlantic Monthly*. 134:1-5 July, 1924.

tries, calling one, for instance, the domain of duty, another the domain of public spirit, another the domain of good form; but I prefer to look at it as all one domain, for it has one and the same characteristic throughout—it is the domain of obedience to the unenforceable. The obedience is the obedience of a man to that which be cannot be forced to obey. He is the enforcer of the law upon himself.

One of the reasons why I have chosen this as the subject on which to speak is that I have spent my life as a commissioner for delimiting the frontier line which divides this domain from the realm of positive law. I have had to decide so frequently whether law could say, "You must," or regretfully to say, "I must leave it to you." This is the land in which all those whom the law cannot reach take refuge. It might be thought from such a description that I wished to annex that country and bring it under the rule of positive law. That is not the case. The infinite variety of circumstances surrounding the individual and rightly influencing his action make it impossible to subject him in all things to rules rightly prescribed and duly enforced. Thus there was wisely left the intermediate domain which, so far as positive law is concerned, is a land of freedom of action, but in which the individual should feel that he was not wholly free. This country which lies between law and free choice I always think of as the domain of manners. To me, manners in this broad sense signifies the doing that which you should do although you are not obliged to do it. I do not wish to call it duty, for that is too narrow to describe it, nor would I call it morals for the same reason. It might include both, but it extends beyond them. It covers all the cases of right doing where there is no one to make you do it but yourself.

All these three domains are essential to the properly organized life of the individual, and one must be on one's guard against thinking that any of them can safely be encroached upon. That law must exist needs no argument.

But, on the other hand, the domain of free choice should be dear to all. This is where spontaneity, originality, and energy are born. The great movements which make the history of a country start here. It covers a precious land where the actions of men are not only such as they choose, but have a right to claim freedom even from criticism. Men must keep safely guarded this right to follow the bent of their nature in proper cases and act as they would without anyone having the right to utter a word of dictation or command. This country forms the other frontier of the domain of manners and delimits it on the side farthest away from that of positive law.

The dangers that threaten the maintenance of this domain of manners arise from its situation between the region of absolute choice and the region of positive law. There are countless supporters of the movements to enlarge the sphere of positive law. In many countries—especially in the younger nations—there is a tendency to make laws to regulate everything. On the other hand, there is a growing tendency to treat matters that are not regulated by positive law as being matters of absolute choice. Both these movements are encroachments on the middle land, and to my mind the real greatness of a nation, its true civilization, is measured by the extent of this land of obedience to the unenforceable. It measures the extent to which the nation trusts its citizens, and its existence and area testify to the way they behave in response to that trust. Mere obedience to law does not measure the greatness of a nation. It can easily be obtained by a strong executive, and most easily of all from a timorous people. Nor is the license of behavior which so often accompanies the absence of law, and which is miscalled liberty, a proof of greatness. The true test is the extent to which the individuals composing the nation can be trusted to obey self-imposed law.

In the changes that are taking place in the world around us, one of those which is fraught with grave peril is the discredit into which this idea of the middle

land is falling. I will give two examples. First, I will take freedom of debate in the houses of legislature such as our own House of Commons. For centuries the members had unrestricted freedom of debate, and no inconvenience was felt. But in recent times some members of this House have said to themselves: "We have unrestricted freedom of debate. We will use it so as to destroy debate. The absence of imposed restriction enables us to do it." This obstruction was developed, and it has destroyed freedom of debate, and, indeed, all useful debate in practically every legislature. The freedom due to absence of positive restriction has been treated by the individual members as leaving their use of debate a matter of absolute choice, fettered with no duty that they were bound to regard. They shut their eyes to the fact that the freedom was given to them in trust to help forward debate, and that it was incumbent on them so to use it. Clumsy and even mischevious regulations have necessarily been introduced which fetter debate but prevent its being absolutely stifled. The old freedom cannot now be entrusted to the members, because when they possessed it they did not respond to it by the exercise of that moral sense which would have led them to treat it as a trust, and not as an absolute possession. unburdened by obligations which they should compel themselves to regard.

It is not only the conduct of individual members of the legislature that furnishes an illustration. The conduct of the legislatures themselves furnishes an equally striking one. It is the fundamental principle of democracies to bow to the decision of the majority. But in accepting this we do not surrender ourselves to the rule of the majority in all things, but only in those things which are of a kind fit to be regulated by government. We do not admit, for instance, the right of the majority to decide whom we should marry or what should be our religion. These are but types of a vast number of matters of great interest in life which we hold to be outside the decision of a majority, and which are for the individual

alone to decide. But in form the power of a government has no restrictions. It has the power to do everything, and too often it forgets that the limitless power does not leave the scope of its legislation a matter of absolute choice on its part, but a choice fettered by a duty to act according to the trust reposed in it, and to abstain from legislating in matters where legislation is not truly within its province. And what is true as to the scope of legislation is also true to a great extent as to the nature of that legislation. But there is a widespread tendency to regard the fact that they can do a thing as meaning that they may do it. There can be no more fatal error than this. Between "can do" and "may do" ought to exist the whole realm which recognizes the sway of duty, fairness, sympathy, taste, and all the other things that make life beautiful and society possible. It is this confusion between "can do" and "may do" which makes me fear at times lest in the future the worst tyranny will be found in democracies. Interests which are not strongly represented in parliament may be treated as though they had no rights by governments who think that the power and the will to legislate amount to a justification of that legislation. Such a principle would be death to liberty. No part of our life would be secure from interference from without. If I were asked to define tyranny, I would say it was yielding to the lust of governing. It is only when governments feel it an honorable duty not to step beyond that which was in reality, and not only in form, put into their hands that the world will know what true freedom is.

The tendency of modern legislation is to extend the area ruled by positive law, and to diminish the area of action which is determined by the decision of the individual himself. But there is one great example in the opposite direction. In one instance the people have deliberately chosen to carve a domain out of that previously covered by positive law and to throw it into the domain where the individual can determine for himself his course

of action. Take the legislation relating to trade-unions and trade disputes. Limitations on the power of combination have been swept away, and to a great extent that which was previously marked out by law is now in the hands of the individuals themselves.

I am far from suggesting that this was a retrograde step, but to my mind the question whether it is dangerous, and whether it may and will become disastrous, depends on whether the masters of workmen who gained this freedom of action, not allowed them by the common law, look upon the change as justifying their treating the matters to which it relates as belonging to the realm of absolute choice, or whether as belonging to the realm where, though not restrained by positive law, they yet recognize the duty of obedience to the unenforceable. Do they recognize that the increase of their freedom of action brings with it not unfettered choice but the corresponding responsibility of using that freedom? That many have failed to realize that this is the true effect of the change has already been made too clear. At the time of the general coal-strike many voices were heard which in a tone hitherto unknown to us cried: "We can by a universal strike bring the nation to its knees." It is a proof of the extent to which the sense of duty ran in the nation, even at a time of such excitement, that this cry was not heeded, and that we came out of the crisis with little harm beyond some labor legislation which will probably have to be modified many, many times before it comes into working order—a very light price to pay for the experience.

I am not afraid to trust people—my fear is that people will not see that trust is being reposed in them. Hence I have no wish that positive law should annex this intermediate country. On the contrary, I dread it. Instead of the iron rule of law being thrown over it I would rather see it well policed by the inhabitants. I am too well acquainted with the inadequacy of the formal

language of statutes to prefer them to the living action of public and private sense of duty.

The great principle of obedience to the unenforceable is no mere ideal, but in some form or other it is strong in the hearts of all except the most depraved. If you wish to know how strong, remember the account of the Titanic disaster. The men were gentlemen to the edge of death. "Ladies first." Why was that? Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good manners in the sense in which I have used the phrase. The feeling of obedience to the unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved. I have no fear of its strength, whatever be the class appealed to. Even if one takes the least educated,—the so-called lower classes, of whom so many are afraid,—one would find the same loyal obedience to unenforceable obligation in the relationships with which these classes are familiar. The danger lies in that by the growth of the democratic spirit they have newly come into much larger powers, and they have not yet learned that power has its duties as well as its rights. When they have become familiar with these powers, and when intercourse with those who have a wider outlook has taught them that the domain of obligation includes them in their use of them, I am satisfied that those who have been loyal to duty in the smaller lives that they have led will be loyal in the wider fields in which they are now able to exercise their power. It is this faith that makes me dread lest we should hurriedly let positive law come in and check the growth of self-reliance, check the growth of the sense of personal duty, and lead people to feel that, if they obey the law, they have done all their duty. It is wiser to exercise patience and let them alone till increase of experience in life teaches them to appreciate better their true position, and to feel that it is still needful for them

to see for themselves that they behave as worthy men should do.

Now I can tell you why I chose the title "Law and Manners." It must be evident to you that Manners must include all things which a man should impose upon himself, from duty to good taste. I have borne in mind the great motto of William of Wykeham—*Manners makyth Man.* It is in this sense—loyalty to the rule of obedience to the unenforceable, throughout the whole realm of personal action—that we should use the word "Manners" if we would truly say that "Manners makyth Man."

## IMPORTANCE OF LAW OBSERVANCE[1]

When travel on the highways was on foot, on horseback or by slow-moving animal-drawn vehicles, there was no occasion to interfere by legislation with the individual traveler's liberty to go where, when and as he pleased; the infractions of duty to use one's own property as not to injure another's were so few and infrequent that they were sufficiently taken care of by private actions for damages. But travel has increased to such an extent, and is carried on in vehicles of such weight and speed, that public necessity has compelled the enactment of laws which completely and effectually take away from every individual liberty to drive, or even walk, on the public highway either when or where he pleases. Does anyone question the right, even the duty of the community to make such laws, such rules of conduct, for the protection of its individual members from the rapacity and recklessness of other individuals, as well as from the consequences of their own folly or daring?

No. No one questions that right and that duty; but many fail to observe such laws and rules, unless they know they are being watched and will be haled into court for the infraction.

[1] From address by John G. Sargent, Attorney General of the United States. *Pennsylvania Bar Association. Report,* 1927:308-22.

Does anyone question the necessity for the infliction of punishment for infraction of such rules, though no specific injury has happened from their infraction, to the end that injuries be prevented?

How many of us realized the enormous burden of taxation we bear made necessary by the failure of those who call themselves good citizens to voluntarily observe the traffic laws, instead of being compelled to obey by surveillance and prosecution?

It seems to be, and by enactment of law is declared to be, the judgment of the community that the use of narcotic drugs is a menace to the health and the morals of the people, and that for that reason the manufacture and distribution of such drugs shall be, as far as possible, suppressed by the imposition of heavy penalties for engaging in such business. The injury to society consists not in their manufacture, their distribution, their sale, their existence even; it only comes when individual members of society, yielding to their cravings voluntarily use them, and thereby render themselves less useful members of that society.

There is probably no person in the country whose personal liberty to do as he would like to do with himself, is more emphatically denied than the drug addict who is denied the means of satisfying his appetite. Yet we say to him:

You cannot have it because we think you are a more useful unit of the body politic without it.

If you do as you desire you will be less able to produce and earn a living for yourself; less able to contribute your share in the world's work; more likely to become a burden to your fellows instead of a helper. Experience has shown that you will be likely while under its influence, to undertake to operate some machine and, because you are not at your best, will injure someone or yourself get injured; you will be likely to undertake to drive your automobile and, because your nerves are not steady or your perception is muddled, run off the road or run into someone else.

You will waste your time while enjoying the stimulus of the drug, and more time while getting over it.

You will neglect your family, perhaps go so far as to attack them. On the whole, we think the best interests of us all, includ-

ing yourself, demand that you go without this thing you want. And so, as you are unwilling, or unable, to abstain from its use if it is within reach, we will compel you to abstain by keeping it out of your reach.

Health and quarantine laws and regulations everywhere, absolutely and wholly deprive the individual citizen of any liberty of action or conduct under the circumstances in which they apply—for the common good and no other reason.

In what I have been suggesting as to various ways in which in the growing complexity of social and commercial relations liberty of personal conduct is constrained to conform to the well-being of the community, as that community shall determine its well-being to demand, I have not, of course, undertaken to discuss the legal phase of the subject; and I would not have you think I regard that as open to discussion—it is determined, settled.

But there be those who say that this principle, that the whole people by enactment of law through duly established process, may determine what practices, businesses and acts are harmful to the whole body, and thereupon forbid them, is not binding on the conscience of any member of the body who, from inclination or interest, wishes to act contrary to the conclusions of the body.

Five generations ago there was revealed to the people of this nation a new relationship between man and man, which they declared and proclaimed in the American Constitution. Therein they recognized a legislature empowered to express the will of the people in law, a judiciary required to determine and state such law, and an executive charged with securing obedience to the law, all holding their office, not by reason of some superior force, but through the duly determined conscience of their countrymen.

Neither politic nor industrial democracy can relieve mankind from the requirement of obedience. There is no substitute for virtue. Too much emphasis has been put on the desire to rule and too little on the obligation to obey. More and more all social problems must be worked out in accordance with this principle. An obedient nation would possess supreme power. The law of life, the law of progress is the law of obedience, the law of service.

It must be remembered that there are standards of morality, customs of intercourse, and the laws made in accordance with the public will of the people which must be observed if * * *

freedom is to be enjoyed. It ought to be plain enough that what is wrong for the individual to do, it is wrong by word or writing for him to advise others to do. There can be no basis for society on the theory that a person may claim the protection of the laws and yet refuse all obedience to the laws.

All of us often, many of us almost daily, find ourselves in some place where The Flag is run up—where a band or an orchestra plays The Star Spangled Banner—and I believe I voice the experience and sensations of everyone within hearing when I say that the sight of an audience of Americans, always rising as one man and standing reverently with bared heads until the ceremony or the music is finished, gives me a thrill that nothing else can furnish.

That flag represents the majesty of the law. It stands at the head of and flies in the breeze for the United States of America and the law and the ideals of the United States of America, as determined upon by the people of the United States of America through and by the government they have established and which they maintain, a "Government of the people, by the people and for the people." It is the flag not of any section of the country, of any division of the people, of any sect or cult, of any state or city or individual; it is the flag of the whole Union, the symbol of the liberties, rights and duties of the whole country; not of parts, but of the nation. It is the symbol of the protection which shields, the power which stands at the side of every American citizen, at home and abroad, wherever on the face of the globe he be.

How can anyone, claiming and having, because he is an American, the benefits of the law of the nation, excuse himself from the duty to observe the law of the nation?

Everyone of us would instantly restrain any man caught tearing down or mutilating that emblem of the sovereignty of the whole people.

How can we palliate the tearing down, the mutilation of the majesty of the law of the whole people?

What is the difference between an attack on the flag and an attack on the thing the flag stands for?

Again, under the conditions in which many, very many of us have come to live, our children come to youth, fed on prepared foods purchased in cans and cartons, clothed with readymade garments bought at some shop, carried in a machine to and from school and church, under no necessity and having no opportunity for any real work, any physical exertion but games and other sports.

Because the way of life has not given them burdens, duties, responsibilities as children, there has not been developed self-reliance, the habit and capacity of looking out for—taking care of themselves.

When, as must happen sooner or later, they are thrown upon their own resources, they are practically helpless.

They crave entertainment, excitement, but because they have never had to take care of themselves, to deal with practical matters, they have no standards of judgment by which to acquire a true sense of values. They need the help, the advice and assistance, a knowledge of the experience, of those who have been more fortunate in having a rougher and more difficult path to travel.

When such youth, to earn a living, learn to do some one thing, to operate some machine, a typewriter, a loom, an engine, no matter what—sell ribbons, soda water bonds, and do that and that only, day after day, in the service of an employer, in a business in which they own nothing, their need for help to see the serious side of life as it is, to form and act upon true judgments, to distinguish between the specious and the real, is by no means lessened—grows.

Another part of us is a considerable number of people who have come from places having social and political systems and theories very different from ours, and so understanding us and our theories and foundations of government but little or not at all.

And we have those who would profit—would live—by preying upon these weaknesses, this ignorance, and who seek to strengthen their position, to forfend against at-

tack and persecution by instilling into the minds of those they would victimize the idea that the law is an instrument of oppression, designed and used to deprive the people of pleasures and comforts which are rightfully theirs.

To my way of thinking, one of the most mischievous forms of propaganda in circulation is the flippant, jeering attitude of certain public prints, journals and other periodicals, toward the law, and the officers of the law striving to secure its enforcement.

You cannot constantly, day after day, treat the antics and predicaments of the opium user as a funny spectacle, the smuggler who provides him with his ruinous poison as a hero, and the officers who undertake to ferret out and punish and prevent the smuggling as snoopers, smellers, gumshoe artists—and so on through the whole list of vilification, without cultivating and raising up in the minds of the thoughtless—and the thinking who want to take that view—the feeling, the impression that the man who robs a mail car, who kills a guard defending the mail, is a hero, too, and that the officers of the law engaged in ferreting out and apprehending the heroic robber are snoopers, gumshoe artists, worthy only of opposition and discouragement in every way possible.

When intelligent, educated men hold up to ridicule the rules for its conduct which society has made; intimate, and by innuendo and suggestion advise that such rules ought to be violated; ridicule and revile as undesirable members of the community, men sworn to defend and enforce its rules; devote their intelligence, wit and resources to making crime and criminals interesting and attractive, why is it not to be expected that the thoughtless, the unfortunate, the ignorant, the vicious, will try to get rid of the oppressors of the criminal in any way, by any means, any violence that will be most effective?

Day by day, because someone pays for the doing of it, and because the great body of law abiding citizens is complaisant and says nothing to show its disapproval,

flippant, jeering writers, publishers, soapbox orators, cabaret performers sow the wind; the society reaps it all in whirlwinds which blast and destroy.

There must not be permitted any substitution of private will for public authority. There is required a renewed and enlarged determination to secure the observance and enforcement of the law.

I would I could, face to face, put this thing as I see it before every man and woman, young and old, in this great Commonwealth. That may not be. But you, the lawyers of this Bar, can say it to them for me, and it is my confident hope you will do so.

I am making this appeal to you, the lawyers of Pennsylvania, because there is no other body of men in the country having the influence and power of the Bar.

To become a lawyer now demands an extensive and careful preliminary general education, and a long and intensive study of subjects which in themselves lay the foundation for an understanding of good citizenship; a study which induces respect and reverence for the law as an abstract guide for conduct, and a respect for the rights of others under the law. It qualifies its devotees to feel and know that this intangible something which is all the time around and over and in us, is the great controlling force whose existence marks the difference between civilization and barbarism.

The lawyer's relations in the community are most personal and confidential. His opportunities for guidance and persuasion to right conduct, for dissuading the tempted and wavering from wrong conduct are many, constant and intimate. His native ability and training make him capable of persuasion and influence; his professional work and relations to his clients give him the opportunity.

Shall we advise and guide our clients, as perchance they may wish to be advised, or as they ought to be advised?

This is a faithful saying, and these things I will that thou affirm constantly, that they which believed in God might be careful to maintain good works. These things are good and profitable unto men.

When comforts and luxuries come easily, when the necessity for long and steady application to toil yields to improved methods and machinery, bringing shorter hours and freedom from exertion and weariness, there is a tendency to forget the serious side of the shield; to turn liberty under law into indulgence regardless of the law; to forget that in the complicated relations individuals now bear to the community and to each other, we cannot be the individualists of a century and a half ago; to forget, or perhaps fail to appreciate, that as the burden of making and getting a living has decreased, the burden of dependence on and duty towards each other has increased.

That burden must be borne, that duty must be discharged, by each one for himself; no one can do it for him.

We have, for a long time, regarded with detestation those who knowingly buy stolen goods; have come to think of them as aids and abettors of the thief, because it is they, and they alone, who make the trade of thieving profitable.

Many of us have as yet failed to see that when we knowingly buy commodities of any kind, traffic in which is forbidden by law, we directly sanction and reward a violation of the law in exactly the same way as does the purchaser of stolen property—by making the violation profitable.

Many of us who have not failed to see it—who have seen it and understood the truth—have failed to understand, or to admit to ourselves, that connivance at violation of one part of the law excuses violation of another part—breeds disrespect for law—enables the man who buys a stolen article at half its value to justify himself with the thought—"My respectable neighbors, bankers,

merchants, professional men, pay someone to break the law to get what they want, why should not I pay the cracksman to get what I want?"

The law forbids the smuggling into the country of jewels, of narcotic drugs. How many self-respecting women would wear diamonds purchased of a smuggler?

What difference between paying for smuggling of diamonds and of narcotics?

It will not do to say in the same breath, "I believe in and demand enforcement of the laws of the country, and I will pay well any man who will violate those laws."

The enforcement of the law is a public duty, imposed by the people upon their servants, which may or may not be discharged, depending upon the integrity, ability and industry of the servants, as well as the cunning, intelligence and skill of violators and the support they get from sympathizers; but the observance of the law is a private as well as public duty, a private, individual of which each individual citizen, and he alone, can make performance absolutely sure.

How can those who make the law, live under and demand the protection of the law, demand enforcement of the law, justify paying others for violating it?

That community, that state, is safe, not where and because the law is enforced, but where and because it is observed, is obeyed.

Whosoever therefore shall break one of these least commandments, and shall teach men so, he shall be called the least in the kingdom of heaven; but whosoever shall do and teach them, the same shall be called great in the kingdom of heaven.

## LAWLESSNESS[4]

Some years ago I had occasion to go from one town to another on Cape Cod and I hired a respectable deacon

[4] From address by Mr. Moorfield Storey, Lawyer, Author, before the Maryland State Bar Association. *Maryland State Bar Association. Transactions*, 1904: 18-39.

of one of the towns to drive me. Our way led through the woods and about half way on our journey we passed a New England trout stream. I said to him, "Are there any trout in that brook?" "Oh, yes, lots of them." "You come occasionally to fish, do you not?" "Oh, no," said he, "it is against the Law." "Well," said I, "it is a lonely place and I should think the boys would occasionally come here to fish and try their luck." "No," said he, "it is against the Law." "Suppose it against the Law, are not the boys occasionally willing to take chances and come here and try to catch fish?" "No," said he, "I have told you it is against the Law."

And that spirit of regard for the Law is such as prevailed at one time very largely in this country, and that spirit as compared with the spirit in regard to the law of today suggested to me my subject.

It is hardly too much to say that civilization is the process of restraining the individual by law, that the liberty of a people depends on its success in curbing by a written or unwritten constitution the power of its rulers, and that the cause of justice in the world is advanced by observing the law of nations. "All that makes existence valuable to anyone," says Mill, "depends on the enforcement of restraints on the actions of other people." The history of civilization is the record of the struggle between might and right, between force and law. Lord Russell in his great address at Saratoga ranked "The narrowing of the domain of mere force as a governing factor in the world, the love of ordered freedom" high among the "true signs" of civilization, while lawlessness is everywhere the badge of barbarism.

Respect for the law seems to be steadily decaying, and by this I do not mean only that lawless acts are common. Sporadic crimes will occur always and in every community. It is only when the community itself tolerates and defends them that they become evidence of its spirit. The lawless acts of private citizens are of evil example, but

when the rulers of the state, our legislators and magistrates, violate the law which they themselves make and which they are sworn to respect and to execute the example is far more dangerous.

As I have suggested in many cases men justify their breach of the law on the plea of necessity. It was necessary to suppress the negro vote in order to preserve decent and orderly government in the South. It was necessary to kill criminals without a trial, in order to prevent crimes. It is necessary to beat and kill strike-breakers that strikers may come to their rights. It was necessary for the Secretary of the Treasury to stretch the law in order to avert a panic with its disastrous consequences to the whole community. It is necessary to build the canal through Panama in the interests of civilization though only a few years ago an able commission preferred the Nicaragua route and Congress had made provision for adopting it if the right to build in Panama was not secured. In each of these cases one may question whether the necessity exists, whether the desired results are secured by law-breaking, whether the cause of civilization is advanced by disregarding the rights of the weak, but it is at least clear that necessity soon becomes only another name for convenience. Men interpret necessity very broadly and soon come to think that considerable or even small personal profit constitutes necessity, as when they accept free transportation from public carriers, or violate the building laws to save expense. Soon mere pleasure is reason enough.

The law is the judgment of the community as to what is necessary or convenient. It is the will of the majority enacted after hearing all sides, and when it ceases to accord with the needs of the community, the law itself prescribes how it may be changed. Whenever a citizen in public office or in private life asserts the right to break the law be his reason what it may, he substitutes his own judgment of what is necessary or expedient for the judg-

ment of the community. Each man makes at once legislature, executive and judge, undertakes to combine in himself the three departments of government, and makes laws not only for himself but for his neighbors at his pleasure. The wisest and most temperate cannot claim this power without conceding it to his most youthful, most careless, most intemperate fellow citizen. He may feel clear that an alleged criminal is not guilty, but some neighbor whom he would not trust to buy a cow for him, may be sure that the accused is guilty and excite a mob of unreasoning persons into burning an innocent man. The power of making laws is in the legislature, and any one, be he President or school boy, who claims this power for himself, and at his own pleasure makes or breaks a law is, as President Roosevelt has so well said, "Weakening the bonds of our civilization and increasing the chances of its overthrow." If the Standard Oil Company tramples law under foot or secretly evades the law to increase its profits, it is sowing the seed of anarchy, and its action weakens the security of life and property throughout the land.

We must return to the ideals of our fathers and insist that this shall be "a government of laws and not of men." The violent invasion of every man's rights by his neighbor can be prevented in any community only by force or by law. Our whole fabric of civilization rests upon the law. It is the framework of our political edifice, which is kept in place by the respect for the law which is felt by the community as a whole. When that is gone, when men no longer obey the law voluntarily because it is the law, there is no alternative but force, which wielded by a just and temperate man today, may tomorrow, fall into the hands of a tyrant or a sot. It was a short journey from Augustus to Nero. In the words of Chatham: "Where law ends tyranny begins." Lawlessness opens the door of the state to the dictator. It always has in human history, and it always will.

We must hasten the leaden steps of punishment lest history apply to us the words of Demosthenes: "What is it that has ruined Greece? Envy, when a man gets a bribe; laughter, if he confesses it; mercy to the convicted; hatred of those who denounce the crime—all the usual accompaniments of corruption."

Lastly, if law is to be respected, it must be respectable. We must purify its source. The law which a majority of the legislatures honestly approve, rests upon a sure foundation. It is the will of the people expressed by their representatives, and they will respect it as such. The law which is carried by corruption, which is bought by money, patronage or other improper influence, is no law but a fraud, and the people not only will not respect it but they lose their respect for all law. Men fight fire with fire, and either try to buy laws for themselves, or unable to do this disregard the statute when their convenience dictates, and so make a law for themselves, thus beginning, to quote again from the President, "the substitution for our civilization of a system in which there shall be violent alternations of anarchy and tyranny." both of which are equally fatal to liberty. Just laws enacted by honest men command respect and execute themselves, but laws which are made to favor an individual or a class unjustly, and are paid for by patronage or cash, whether paid to the legislator or the campaign fund of his party, rest upon injustice and corruption and infect the whole body politic.

The great enemies of our civilization are thus described by a recent writer in the *Congregationalist.*

> They bribe members of boards of education, municipal legislators and national parties. They steal with one hand and donate to churches, colleges, hospitals and to social betterment with the other. They denounce anarchy imported from Europe and manufacture it themselves at home.

They are, indeed, anarchists, for their business and social success rest upon the violation of law. The harmless speech of John Turner, or the ravings of Emma

Goldman do not threaten the stability of our government. The real danger comes from those who buy their way through the law, or buy the law itself. Against these men every force of society, the press, the pulpit, the courts, the universities, every exponent of public opinion must be directed. Upon them should be visited every legal and social penalty that can be applied. They are the worst of traitors not only to the government of their country, but to the cause of human freedom, for in their lawless pursuit of success they are undermining the law which is the only sure foundation of both. Herbert Spencer said in 1882:

> Free institutions can be maintained only by citizens, each of whom is instant to oppose every illegitimate act, every official excess of power, however trivial it may seem. * * * All these lapses from higher to lower forms begin in trifling ways and it is only by incessant watchfulness that they can be prevented.

But this statement after all only explains and amplifies the phrase which has become so trite that we cease to consider its meaning:

> Eternal vigilance is the price of liberty.

The President is right when he says: "The very existence of the republic depends on that spirit of orderly liberty under the law which is as incompatible with mob violence as with any form of despotism," and we must all enlist in defense of the law, lest we learn too late that there is a Law which no nation and no man can violate with impunity, that universal Law by which ruin waits upon corruption, and which was written for all time in the stern sentence: "The wages of sin is death."

## RESPECT FOR THE LAW[5]

Obedience to law and law enforcement are not purely modern questions. They have engaged the wisdom and statesmanship of the oldest civilization.

[5] From address by Thomas E. Davidson, Greensburg, President State Bar Association of Indiana. *Indiana State Bar Association. Report,* 1915: 64-82.

Solon said: "That state was the most civilized in which citizens, having themselves received no provocation, pursue with as much warmth the reparation of an injury to another as if they had personally received it."

And Aristotle: "That the virtues of a good citizen were to know how to govern like a freeman and how to obey like a freeman."

And Epictetus: "Law intends to do service to human life, but it is not able when men do not choose to accept her services, for it is only in those who are obedient to her that she displays her special virtue."

These taught that the strength of laws was in respect for the laws; that with respect came obedience.

"The best laws," said Aristotle, "though sanctioned by every citizen, will be of no avail unless the young are trained by habit and education in the spirit of the constitution."

A citizenship trained to respect and obey, such was the wisdom of the ancients. From this citizenship came those whose duty it was to enforce the law.

There are those who maintain that the functions of government should be confined to the protection of life, liberty and property.

That beyond this the doctrine of "non-interference" should obtain.

These look upon society from the standpoint of the individual. They overlook the fact that when the individual enters society he becomes a part of and is merged into the whole; that he can no longer live to himself; that each unit acts upon the whole.

That in organized society the question is "What is best for the whole?" Knowing that what is best for the all must be best for the one. "That regard be had for the public welfare," runs the maxim. Hence, it is now regarded as being within the province of government to enact laws caring for, protecting and improving the morals of the citizens.

It is these latter laws and the enforcement of the same which call for serious consideration, and out of which have arisen the most of the problems of unenforced laws.

Not entirely, of course, for even laws against the most infamous of crimes are not always enforced.

There is a cause of unenforced laws, back of indictment, arrest and trial. Citizens forget that the offense is not against the particular injured party, but it is against society. Therefore, when their property is stolen or their person assaulted, they think if the stolen property is restored or the salve of gold applied to the bruised body that the offender has paid full value and should go acquit.

The offense is dual in character. There is, of course, a direct injury to the individual whose property has been stolen or upon whom the assault has been committed. These criminal laws, however, were not passed to indemnify the individual, but to protect society.

This "good citizen" has no appreciation of the duties of citizenship. He does not want to pay his debts to society. He wants the benefits without the burdens. But let his own purse be taken, or a member of his own family assaulted, and he is at once transformed. He is filled with righteous indignation and loudly proclaims himself on the side of law and order. His citizenship is unbalanced. He himself is lawless. He needs to be educated. Citizens of this type fail to comprehend the future effect of such conduct on crime and criminals; that such conduct stimulates, rather than retards crime, and directly contributes to the non-enforcement of the penal laws.

Says Aristotle:

> The best laws, though sanctioned by every citizen of the state, will be of no avail unless the young are trained by habit and education in the spirit of the constitution. Men *think* that what is equal is just, and that equality is the supremacy of the popular will; and that freedom and equality mean the doing what a man likes. In such democracies every one lives as he pleases, or in

the words of Euripides, "according to his fancy." But this is all wrong and men should not think it slavery to live according to the rule of the constitution, for it is their salvation.

We ourselves must have respect for the law. We ourselves must obey the law. It is not enough to respect the laws against the more heinous offenses. We are not apt to condone these crimes. Such respect, however, is not the full measure of our duty. We must have and cultivate respect for the lesser laws.

Again I quote from Aristotle:

> In all well tempered governments there is nothing which should be more zealously maintained than the spirit of obedience to law, more especially in small matters; for transgression creeps in unperceived and at last ruins the state, just as the constant recurrence of small expenses in time eats up a fortune.
>
> The change does not take place at once; therefore, is not observed; the mind is deceived, as in the fallacy which says: "if each part is little, then the whole is little." And this is true in one way but not in another, for the whole and the all are not little although they are made up of littles.

## BUILDING RESPECT FOR LAW[6]

When Socrates lay in prison under sentence of death for impiety, his friend Crito visited him and offered to help him escape and to smuggle him out of the country Socrates refused, because it seemed to him that the laws of Athens were saying:

> Is it your purpose by acting in this way to destroy us, the laws, and the whole city, so far as your influence extends? Do you think it possible for a city to exist and avoid utter ruin in which the decisions of law do not stand valid, but are set aside and nullified by individual citizens?

The attitude of Socrates toward the laws of his city is truly the right stand for the citizen of a free, self-governing state. Under the rule of king or nobles a great number of soldiers, police, and spies are maintained in order to scare the common people into obeying the laws

[6] From article by Edward Alsworth Ross, Professor of Sociology, University of Wisconsin. *World Review.* 2:248-9. June 7, 1926.

that uphold the privileges of the favored classes. In Russia under the czars, for example, a vast and cunning organization of terrorizing agencies was maintained to overcome the natural reluctance of the people to obey laws which were not framed in their interest and to which they had in no way given their consent.

Under the rule of the people, on the other hand, the laws for the most part reflect the opinion of the public as to what is fair and reasonable, so that the amount of force put behind the laws is, perhaps, not a fifth of the force put behind law under class rule. Soldiers are rare, and their job is to defend their country rather than overawe their fellow countrymen. The police are few, and they are denied the use of many high-handed practices which are open to them under governments maintained by force.

Disobedience to law is like blood poisoning—it spreads. The more I see my fellow citizens flout laws which get in *their* way, the readier am I to flout a law when it gets in *my* way.

At times we see some headstong magnate hold himself above the law. He dodges taxes, shoots deer out of season, employs children under the legal age, and violates laws against combination and price-fixing. Yet if the disgruntled workmen of his factory put emery dust into into the oil cups of his machinery to spoil the bearings, or abuse non-union workers, he raises a great outcry against "lawlessness." Loyal Americans will despise a man who, after trampling on those laws which annoy him, turns around and insists upon the obligation of everybody to obey those laws which work to his benefit.

The doctrine that you are to obey even laws you may not believe in is essential in a society like ours, changing rapidly and constantly coming into situations which call for new restraints. For it is not the old time-hallowed laws which good men are tempted to disregard. No decent man questions his duty to obey laws against

stealing, smuggling, arson, counterfeiting, or bigamy. On these matters public sentiment has had time to become *ripe*. It is the laws directed against mischievous conduct not yet generally recognized as bad, which good men may rebel against. Thirty years ago food dealers hardly regarded adulteration as criminal. Thirty years hence all will recognize it as such. Meanwhile, for the sake of the public, we have had to enact pure food laws before all the people concerned see the facts clearly. Likewise, we cannot wait to bar young children from the mills until every manufacturer regards the sacrifice of the child's schooling as a shame. We have to prohibit misleading advertising before all business men can see that it is wrong.

There are laws which are worse than useless in that they require the citizen to do what may be against his conscience. In American history the most famous instance is the Fugitive Slave Act of 1850, which obliged the citizen, when called upon, to assist in catching and returning runaway slaves to their masters. Thoreau, one of the great lights of American literature, went to jail rather than pay taxes to a government which would command such a thing. Wendell Phillips advocated disregard of the law, and his statue is in the Public Gardens of Boston. The abolitionists believed that bad laws may be so powerfully supported that the only way to obtain their repeal is to violate them. Likewise, in the United States, England, and Russia, there are religious bodies which teach that it is never right to take the life of a fellow man. When drafted to fight, some of these "conscientious objectors" will endure any punishment rather than go against their conscience.

Now, such disobedience should not be classed with ordinary lawbreaking. Nine hundred ninety-nine thousandths of law-breaking is from unworthy motives; but the abolitionists and conscientious objectors, regarding slavery or war as against God's law, are not violating

the law from low motives, but from very high motives. So long as it exists, the law has to be enforced on them as upon lower types; but we are not entitled to look down upon them as upon ordinary lawbreakers.

## ROMANCE OF LAW[1]

When freedom is unrestrained by law, the lives of men and the lives of nations come to terrible and complete disintegration. When law is uninspired by freedom, life becomes conventional and hard and mechanical. Its deserts with their hot and unproductive sands seem to be calling out for apostles of revolt. But when law has freedom at the heart of it, when we do what we ought to do—not merely driven by a sense of duty, but guided by an eager heart—then all is changed. When you obey the law because you love to do it, you have all the fun which comes from license and all the character which comes from obedience. When the law is set to music it has the delightful characteristics of indulgence and none of the bad and after effects which come from riotous and indulgent ways.

When we stop to think of it, there is no freedom which is not soundly based in law. I never felt such a delicious sense of freedom as when one day during the war I went flying over London in a big Handley Page bombing machine. I felt as if I could shake my fist at the law of gravitation. But was that flight a defiance of law? In fact, it was the most definite result of the most complete obedience to no end of physical laws. If for a single second any one of these laws had been disobeyed, the career of that bombing machine would have come quickly to an end. Yet there we were, with all the vast exhilaration of flight! At that moment we discovered the romance of law. For when we learn that

[1] From article by Lynn Harold Hough, Educator, Clergyman, Contributing editor to Christian Century. *Christian Century.* 40:154-51. November 29, 1923.

obedience is emancipation, we have made one of the most astounding discoveries of life. The great laws take care of themselves. As Mr. Chesterton once said, "If a man jumps from a cliff he does not break the law of gravitation, he only illustrates it." We make laws our slaves when we obey them. We pull the very elements of our lives apart when we defy them.

This freedom of obedience is structural in that noble liberty which belongs to a democracy. The real difficulty with an anarchy would be that everybody would always be in the way of everbody else. Law is a device by which I secure a free path on condition that I give another man a free path. So law is the under side of freedom. And freedom is the other side of law. Until there is an effectively functioning law against murder there is no security in the freedom of life. Until there is a law to protect property there is no real freedom to build noble houses. For without the protection of law nobody will take the risks. Every step in civilization involves the sacrifice of some license in the name of constructive liberty, the surrender of something with seeds of evil in it for the sake of the common good. In the most practical sort of way the eighteenth amendment has given new freedom to bank accounts, new liberty to homes of comfort, new opportunity for food and clothing and no end of those elements which go to make up a prosperous life. It may seem terribly hard to give up the saloon. It seems a good deal easier when you hear the gay and contented laughter of multitudes of happy children emancipated from a terrible servitude to poverty and fear. There is an unsuspected romance even about the Volstead act!

When any group of men substitute their own will for the careful and stable processes of law, you have a bad day for the nation and a bad day for the world. There is no religious group and there is no racial group which can be shut out from the protection of the basic

laws of our land. There is one structural law. And its projections and its penalties belong alike to Protestant and Catholic and Jew, to white and yellow and black.

Lawlessness defeats itself in the long run. For the laws which are flouted break the lawbreakers completely enough at last. But the pathos of it all is that only dust and ashes are left behind. There is a far nobler and a far more hopeful way to deal with the problem of the relation of law and freedom. That is the way of the men and women who learn the secret of the high adventure, the gracious romance, the glorious freedom which come only to those who keep the law. Robert Browning found it infinitely more exciting to be true to his wife than some contemporary men of letters find it to be false to theirs. It all comes at last to the difference between the Old Testament and the New. The one is the literature of a kingly conscience. The other is the literature of an enfranchised heart. The men of the New Testament have found a new motive which transforms old acts. They still keep the ten commandments. But now the ten commandments have been turned into a marching song. It is not an escape *from* law but an escape *in* law which we need. The man who discovers the romance of law can be as free as the anarchist would like to be and at the same moment as nobly obedient as the Apostle Paul. The emancipated heart has at last no quarrel with the law-abiding life. If America should discover the romance of law, the future of this republic would be secure.

## ENFORCEMENT OF LAW[8]

This nation never stood in greater need than now of having among its leaders men of lofty ideals, which they

[8] From address of President Roosevelt at Harvard University, June 28, 1905. *In* Compilation of the Messages and Speeches of Theodore Roosevelt, 1901-1905. Alfred H. Lewis, ed. Vol. 1, p. 645-8. Bureau of National Literature and art. N.Y. 1906.

try to live up to and not merely to talk of. We need men with these ideals in public life, and we need them just as much in business and in such a profession as the law. We can by statute establish only those exceedingly rough lines of morality, the overpassing of which means that the man is in jeopardy of the constable or the sheriff. But the nation is badly off if in addition to this there is not a very much higher standard of conduct, a standard impossible effectively to establish by statute, but one upon which the community as a whole, and especially the real leaders of the community, insist. Take such a question as the enforcement of the law. It is, of course, elementary to say that this is the first requisite in any civilization at all. But a great many people in the ranks of life from which most college men are drawn seem to forget that they should condemn with equal severity those men who break the law by committing crimes of mob violence, and those who evade the law, or who actually break it, but so cunningly that they cannot be discovered, the crimes they commit being not those of physical outrage, but those of greed and craft on the largest scale.

The very rich man who conducts his business as if he believed that he were a law unto himself thereby immensely increases the difficulty of the task of upholding order when the disorder is a menace to men of property; for if the community feels that rich men disregard the law where it affects themselves, then the community is apt to assume the dangerous and unwholesome attitude of condoning crimes of violence committed against the interests which in the popular mind these rich men represent. This last attitude is wholly evil: but so is the attitude which produces it. We have a right to appeal to the alumni of Harvard and to the alumni of every institution of learning in this land to do their part in creating a public sentiment which shall demand of all men of means, and especially of the men of vast fortune, that they set an example to their less fortunate brethren by paying scrupulous heed not only

to the letter, but to the spirit of the laws, and by acknowledging in the heartiest fashion the moral obligations which cannot be expressed in law, but which stand back of and above all laws. It is far more important that they should conduct their business affairs decently than that they should spend the surplus of their fortunes in philanthropy. Much has been given to these men, and we have a right to demand much of them in return. Every man of great wealth who runs his business with cynical contempt for those prohibitions of the law which by hired cunning he can escape or evade is a menace to our community, and the community is not to be excused if it does not develop a spirit which actively frowns on and discountenances him. The great profession of the law should be that whose members ought to take the lead in the creation of just such a spirit. We all know that, as things actually are, many of the most influential and most highly remunerated members of the bar in every center of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individuals or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth.

Now, the great lawyer who employs his talent and his learning in the highly remunerative task of enabling a very wealthy client to override or circumvent the law is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and of disbelief in their efficacy. Such a spirit may breed the demand that laws shall be made even more drastic against the rich, or else it may manifest itself in hostility of all laws. Surely Harvard has the right to expect from her sons a high standard of applied morality, whether their paths lead them into public life, into business, or into the great profession of the law, whose members are so potent in shaping the growth of the national soul.

# NULLIFICATION

## UNENFORCEABLE LAW[1]

Certain students of political science have isolated a phenomenon of our legislative and administrative systems, which they have described as "unenforceable laws." These laws, although enacted by the legislative authority with due observance of statutory and constitutional safeguards, are asserted to be fundamentally enforceable. Thus, statutes have been given a new classification either as enforceable or as unenforceable.

Various reasons are assigned for the weakness in laws which renders them unenforceable; it is claimed that either they do not meet with general public approval, or they are favored only by a minority, or they have become archaic. Many of these laws are condemned as sumptuary and interfering with personal liberty and aiming to enforce uniformity of personal habits through state sanction, and some are described more harshly as arbitrary and tyrannical. Unenforceable laws are placed in a twilight zone between innocence and evil, in which transgression is generally indulged, if not with the connivance, at least with indifference, on the part of constituted public authority. The harmful reaction of such a condition is found by these students in the weakening of the restraint of law, the loss of confidence in the administration of justice, and the inefficacy of our governmental system. If this is an evil condition of affairs obviously it can be remedied only in one of two ways—by the repeal of all laws which have proved to be un-

[1] From article by Charles S. Whitman, New York. *American Bar Association. Repc '* 1921: 260-5.

enforceable or by refraining to observe and enforce them.

The concept of the unenforceability of a portion of our laws has elements of great danger. Its establishment would largely curtail the function of the legislative branch in our scheme of government. In practical effect, it would not even require the initiative or referendum. It challenges certain laws simply because they are opposed by groups of individuals who conceitedly believe that they personify public opinion. Extended to its logical conclusion, this treatment of a great portion of our law would, in my judgment, greatly weaken the forces of our organized social system and jeopardize its security.

The view that laws are or become unenforceable when not in accord with public opinion is purely doctrinaire. The implication that a large mass of our population is not law-abiding is contrary to the observation of those who have had wide experience with the making, administering and enforcing of laws in this country.

Law as the essence of social order in its relation to property and person is coextensive with society itself. Law is mandatory, and it is the mandatory character of law which distinguishes it from religious precepts and moral conventions, observance of which depends purely upon personal predilection. One repeats such truisms apologetically; but the disregard of fundamentals leads to the doctrinaire notion under discussion.

We need not now inquire whether moral concepts or social conventions lead to, or are derived from, law declaratory of positive rules of conduct. In our republican form of government, means and ways are provided for the orderly expression of the popular will, and, when the popular will is so expressed, it is sheer defiance of law and order to segregate laws for enforcement and laws for non-enforcement.

What is the dictate or demand of public opinion or what is popular, is a question not easily answered. The

answer depends to a large degree upon the ascertainment of the true medium for expressing the public opinion. Usually, that medium represents a majority of the people, and so reflects the majority desire. But often that medium represents a plurality, which is in fact only a minority of the people. In a state whose people are governed by a constitution, the medium of popular expression is defined and is not migratory.

The authors of this concept of unenforceable law have sought to cast the odium of it upon legislative shortcomings. But criticism for any fault may not justly be confined to that source. The enactment of a law requires merely the exercise of legislative power. But the enforcement of a law calls into play a succession of forces. Laws ordinarily are not self-executory; some laws which deal merely with status operate imperceptibly; but laws which regulate the disposition of property or the activities of individuals require positive control by various governmental agencies. They require legislative provision as to the instrumentalities and means for enforcement, the exercise of the executive power to compel observance, and the administration of the judicial branch of government, to adjudge transgression. Law enforcement is made up of a long train of functions, the failure of any one of which may leave the rest impotent. It is usually the failure of some individual element, with the resultant inability of the combined elements to function effectively, that renders a law unenforceable.

Not every law depends for its existence upon moral attributes. Many laws are imbedded in the necessity of society for protection from detrimental or destructive influences.

The mere fact that a law is irksome does not prove that it is inconsistent with public welfare. Laws to prevent debauchery of the electorate in Rome met with riotous opposition by the populace, yet does anyone doubt their beneficence merely because they were opposed to

popular notions of honesty? The following chronicle of this episode in Roman history is, indeed, interesting (*Plutarch's Life of Cato the Younger*, ed. A. H. Clough, Vol. IV, p. 414):

> The people were at that time extremely corrupted by the gifts of those who sought offices and most made a constant trade of selling their voices. Cato was eager utterly to root this corruption out of the commonwealth; he therefore persuaded the Senate to make an order, that those who were chosen into any office, though nobody should accuse them, should be obliged to come into the court and give account upon oath of their proceedings in their election. This was extremely obnoxious to those who stood for the offices and yet more to those vast numbers who took the bribes. Insomuch that one morning, as Cato was going to the tribunal a great multitude of people flocked together, and with loud cries and maledictions reviled him and threw stones at him.

The ancient experience of Rome is not perhaps without parallel today. For years, efforts have been made to reform our electoral machinery. Every new effort has been met by some new artifice to evade the law. Laws as to reporting the expenditures of candidates for political office have been made a mockery, and only the most flagrant and crude violations of elections laws have proved susceptible of prosecution and punishment. Are such laws, therefore, to be classed as unenforceable?

Failures of law enforcement are due more often to organic defects than to popular opposition. The unconstitutionality of a statute voids it. Imperfections in legislative drafting have many times frustrated the object of a particular law. The failure of the legislature to provide the necessary financial means or administrative staff will render a statute dormant. A subservient executive officer can thwart a law. A corrupt or inefficient police administration can defeat or circumscribe the operation of a law. An incompetent prosecutor can render the law futile. Judicial fiat can nullify the effect of a law. Leniency in penalizing violations will make a law sterile.

The subject under discussion finds an analogy in the broader domain of law which is presumed to regulate the conduct of nations toward each other. But very recently the question was debated by lawyers and publicists whether, as so many customary and conventional rules of international law had been swept aside in the holocaust of the World War, international law had not ceased to exist; whether, because these generally recognized rules of international conduct had become incapable of enforcement, international law still survived?

While the great conflict was raging, Elihu Root, as President of the American Society of International Law, on December 28, 1915, taking for his topic *The Outlook for International Law,* gave utterance to the following:

> While the war has exhibited the inadequacy of international law, so far as it has yet developed, to curb those governmental policies which aim to extend power at all costs, it has shown even more clearly that little reliance can be placed upon unrestrained human nature, subject to specific temptation to commit forcible aggression in the pursuit of power and wealth. It has shown that where questions of conduct are to be determined under no constraint, except the circumstances of the particular case, the acquired habits of civilization are weak as against the powerful, innate tendencies which survive from the countless centuries of man's struggle for existence against brutes and savage foes. The only means yet discovered by man to limit those tendencies consist in the establishment of law, the setting up of principles of action and definite rules of conduct which cannot be violated by the individual without injury to himself. That is the method by which the wrongs naturally flowing from individual impulse within the state have been confined to narrow limits. That analogy, difficult as it is to maintain in view of the differences between the individual who is subject to sovereignty and the nation which is itself sovereign, indicates the only method to which human experience points to avoid repeating the present experience of these years of war consistently with the independence of nations and the liberty of individuals.

Apparent lapses in the enforcement of law are largely due to the means and methods of law enforcement, and not to popular sentiment. The enforcement of a law sometimes does fail, but the reason for it will be found

in the breaking down of the enforcement machinery and not in the popularity or unpopularity of the law itself. The public is not opposed to the enforcement of laws, nor will the people refuse to observe them even if they are obnoxious to some. Public officials do not suffer in consequence of enforcing laws, provided their conduct in such enforcement is guided by motives free from taint.

The attitude of the great body of citizens in this country is to support law enforcement, and the theory that popular approval or popular lassitude sanctions the non-enforcement of a portion of the law is, in my judgment, misconceived.

## LAW MAKING AND LAW ENFORCEMENT[2]

What can we do to protect ourselves against this spirit of over-regulation which seeks to place under official control not only the organization of industry and commerce but the conduct and even the thought of the people themselves?

Some say that we should look to the courts. This is good advice as far as it goes. The courts can interpret the law so as to correct manifest absurdities of wording; they can set aside parts of the law when these parts are in clear conflict with legal traditions, especially where those traditions have been embedded in the constitution. But the extent of the protection which the courts can give is narrower than is often supposed. If a law does not violate a state or federal constitution the courts cannot interpret it out of existence because its practical effects are inequitable, or because it is evaded by those whom it should control. Perhaps they could go a little farther in that direction than they now do, but it is not clear that this would be wise. It would involve perpetual danger of a kind of conflict between the courts and

[2] From article by Arthur Twining Hadley, *President Emeritus, Yale University. Harpers Monthly Magazine.* 151: 644-8. November, 1925.

the legislature which is undesirable to the last degree. For anything like full protection in this matter the people must look to themselves and not to the courts.

They have in their own hands, if they wish to apply it, a simple though somewhat perilous remedy. If any considerable number of citizens who are habitually law-abiding think that some particular statute is bad enough in itself or dangerous enough in its indirect effects to make it worth while to block its enforcement, they can do so. This process of blocking the law by disobedience is known as nullification. The Fugitive Slave Law was thus nullified by the people of the North; the Reconstruction Acts were thus nullified by the people of the South. A large number of laws for the taxation of personal property have been and are still being nullified to-day. They are so framed as to be penalties on honesty rather than taxes on property; and neither the public nor the officials themselves are willing to attempt stringent enforcement of a law of this kind.

Most writers on political theory say that this kind of nullification is nothing less than revolution; that we have made some sort of agreement with some sort of a sovereign which gives him despotic authority to make any laws he pleases provided he proceeds under constitutional forms. This is a convenient theory for whoever claims to be sovereign—whether he be called king, consul, or boss—but it is very far from representing the facts in the case. The members of any civilized community actually use their judgment a great deal in deciding how far they will obey laws which they regard as bad or even inconvenient for the community. They do not change their sovereign; they continue to obey him in all other fields except this one. There is no revolution and nothing like it. The officials charged with the enforcement of the law simply see that it is beyond their power to secure obedience to it. If those who passed the law or secured its passage are wise, they will acquiesce in

this result. If the police look the other way when such a law is broken, its bad effects are avoided without much harm to anybody. Hundreds of statutes which the courts would try to enforce if violations were brought to their notice are made "dead letter" by general consent.

Some people go so far as to say that this nullification of statutes is wrong in practice as well as in theory; that the best way to get rid of a bad law is to enforce it. But the cost of trying to compel obedience to a law which violates the consciences of a considerable minority of the people or the traditional usages and privileges of anything like a majority is usually too great. The attempt to enforce the Fugitive Slave Law converted the misunderstandings between North and South into public menaces. The attempt to enforce the Reconstruction Acts not only resulted in abject failure but left a legacy of bitterness behind it which lasted for many years. What has proved true in large matters like these has generally held good in small ones. The efforts to enforce legislation regarding Sunday amusements, for instance, have usually produced an amount of vexation and trouble far out of proportion to any tangible results that could be expected or achieved.

And in addition to the direct cost, the individual evil resulting from the successful enforcement of a law restricting the traditional liberties of the citizen is usually very great. The appetite for tyranny grows with its excesses. If the autocrat is allowed to use the army to enforce one such act, he tries to use it for others. Charles the First went on with progressive encroachments on the traditional liberties of the English people until John Hampden set the exemple of nullification by not paying ship money. From that day the King's power began to wane; at first imperceptibly, then rapidly. The courts adjudged Hampden wrong and punished him; but the verdict of posterity is different. It praises Hampden for having taken the only way to save England from the fate which befell France or even Spain; it condemns

Charles for persisting in a course which led inevitably to civil war and to personal disaster.

Nullification, as I have said, is not revolution. It is the safety valve which helps a self-governing community avoid the alternative between tyranny and revolution. It reduces the tension; it gives a warning to those in authority which they disregard at their own peril. For the story of Charles the First and John Hampden is not an isolated one. The same story and the same consequence have been too often repeated to leave any doubt that the major responsibility for civil strife lies on the law maker rather than the law breaker.

But while nullification is an obvious remedy, and sometimes the only available remedy, for unwise legislation, it is at best an unsatisfactory one. For if a good man breaks a bad law under pressure of necessity, it will encourage another man who is not so good to break several other laws which may not be bad at all. Defiance of the Reconstruction Acts was undoubtedly better, for the South and ultimately for the Nation, than compliance possibly could have been; but it left behind it a legacy of lawlessness and unrest from which the community is still suffering. And in the more serious cases it always involves a danger of civil war. The sovereign, or the group which regards itself as sovereign, may be unwise enough to mistake the mandate of the legislature for the mandate of the people and precipitate a conflict disastrous not only to the monarch or group but to all concerned. To insure the safety of the commonwealth we must prevent the enactment of bad laws by the development of sounder public opinion as to the nature of government and the functions of legislative assemblies.

To begin with, we must learn to distinguish more carefully between the government and the people. The people is a large body of individual men and women who live under a form of government established to maintain their freedom against invasion or control from outside,

and against disturbance of public safety or convenience from within. For these purposes they have designated certain of their number for positions of trust in that government. Some of the men thus designated are charged with the difficult duty of determining, by judicial procedure or by legislative enactment, the exact claims, powers, and duties of different members or groups of members of the community; but in the exercise of these powers they are acting as trustees and not as sovereigns.

It is necessary to emphasize this point very carefully because our habit of personifying the government and calling it "the State," spelled with a capital "S," is one of those small errors of usage which leads to large errors of thinking. It is proper to spell State with a capital "S" when it means some particular state or group of states—State of New York, States of the Church—but in other cases "the State" spelt with a capital letter almost always means "the government pretending to be the people." The ancients understood and avoided this danger better than we do. The Latin word for the body politic was *res publica, the common wealth*—a term that emphasized the sense of trusteeship. If we say "the people" when we mean the people and say "the government" when we mean the government we shall unmask a large number of dangerous political fallacies.

Having once done this we can emphasize the fact that a modern civilized government is not a sovereign in the absolute or oriental sense of the term, but a group of trustees whose purposes are defined and whose powers are limited, partly by an instrument known as a constitution and partly also by those habits and usages which underlie the public opinion and consent on which the government itself is founded, and which its officers disregard at their own peril.

What are these purposes for whose realization the government officers hold their positions in trust?

Primarily to get public business done honestly and efficiently. This involves the maintenance of a military force to protect the community from outside interference; the establishment of courts to determine the rights of different individuals under the usages and laws of the land, with an impartially managed police to carry these decisions into effect; the development of corporate agencies, public or private, for the promotion of public convenience, health, or intelligence; and the assessment, in an equitable manner of the taxes necessary to defray the cost of performing all these duties.

Secondarily, to formulate public opinion and provide rules for its orderly enforcement, in cases where older usages and statutes, as interpreted by the courts, are inadequate to deal with new conditions. This process is known as legislation and has become in modern times an important function of representative assemblies.

In old days, when industrial progress was slow, very little general legislation of this sort was needed. Almost all that was necessary was taken care of by ecclesiastical authorities—the priests in Jerusalem, the prætors in Rome, the Lord Chancellors in Catholic England—who, when the forms and remedies of the old law became inadequate to carry out its underlying purpose, took upon themselves, as keepers of the public conscience, the power of developing new forms and new remedies. Even in states nominally democratic, like Athens, there was a general reluctance on the part of the people to legislate on matters which could be regulated by religion or public opinion; and this reluctance was still more noticeable in bodies like the Roman Senate, which in the six hundred years of its ascendancy passed less than two hundred acts that deal with matters of private law.

Since the end of the fifteenth century several causes have united to produce a change. New inventions and discoveries have created rapid social and industrial progress and with it a demand for corresponding changes in

the law. The Protestant Reformation has made the public less ready to leave the control of civil law in the hands of ecclesiastical authorities. The success of the English Parliament in its struggle with the King has given that body the chance, not only to widen its sphere of legislation, but to claim for its acts the same sort of sovereign authority which kings had claimed of old for theirs. In other words, it has come to regard itself as *making* the laws.

Our American constitutions have never accorded our representative assemblies the same unlimited authority which was asserted by Parliament. But in its own legislative sphere each has been encouraged, by the courts and by the people, to think itself sovereign; to believe that by its own *ipse dixit* it has created the laws which it frames and given them whatever authority they possess. You can of course define authority in such a way that this last statement is true; but when you make the statement without the definition it is misleading and dangerous. For if a law lacks the authority of conscience and public opinion, it lacks precisely the qualities which are necessary to make it effective in a self-governing commonwealth.

As far as state legislation is concerned, we have recognized the evils resulting from unrestricted activity of the representative assembly; and we have taken measures to protect ourselves against them—sometimes by the referendum, sometimes by putting into state constitutions the more fundamental provisions of private as well as public law. But against Congress we have no such protection. All the more important is it to bring home to the members of Congress the fact that they hold their office as trustees, not as parts of a sovereign body. For nowhere is the recognition that public office is a public trust more needed than in the formulation of the laws of the land.

Guilty of breach of trust in large degree is the congressman whose vote on an important measure is swayed

by any personal considerations whatever. Guilty in scarcely less degree are the men who use threats of punishment or hopes of reward, however veiled, as a means of influencing the congressman's vote. Nor can we wholly acquit of responsibility the publicists and the teachers who by their incautious use of language have encouraged the legislator to believe that he held a sovereign power, repugnant alike to his position as a trustee and to the spirit in which our government was founded. It is only by the acceptance of the principle of official trusteeship that the world, or any part of it, can be made safe for democracy. Until this result is reached there will continue to be occasions when the devoted lover of self-government—the true Christian who values the liberty of the Gospel higher than the bondage of the Law—will often have to choose between the danger of lawlessness which results from ignoring a statute and the danger of tyranny which is involved in passive obedience.

## ORDEAL OF PROHIBITION[1]

The long code of laws in America which have passed into history under the name of the Blue Laws furnish another illustration of the way in which fanaticism burdens the statute-books with oppressive legislation, and also of the way in which the common sense of the people finally disposes of it. It would be hard to find a variety of conduct that the Blue Laws did not attempt to regulate or any expression of pleasure that was not frowned upon or forbidden. They forbade women to dress their hair in a way that would attract attention, or to wear ribbons or silks. They forbade attending theatres; all kinds of travel on Sunday, except going to and from church; sleeping in church, not attending church, and the playing of any game of any sort on Sunday. They

[1] From article by Clarence S. Darrow, Lawyer. *American Mercury*. 2: 419-27. August, 1924.

regulated the diet of the people, and of course regulated it so that they could eat nothing which tasted good or was expensive. They constituted, in brief, a desperate crusade against joy. Their theory was that good people would have their pleasures after death, and that the less joy they indulged in on earth the more they would get in the hereafter.

These laws made it the duty of all men to deliver offenders to the police for punishment. They made spies and informers of every citizen, and those who failed to serve did so at their peril. Dancing was forbidden; children were forbidden to walk the streets and fields on Sunday, for "they misspend that precious time, which tends to the dishonor of God and the reproach of religion, grieving the souls of God's servants." Parents were required to punish any child over seven years old for these offenses and to report it to the authorities in case punishment accomplished no result. In order that the Sabbath should be strictly observed it was provided that Saturday night, after sundown, was a part of the Lord's Day, but that the Sabbath did not end at sunset on Sunday, but continued until midnight. Death for cursing or striking parents was decreed by the Massachusetts Colony in November, 1646, if done by a boy or girl over sixteen years old.

Politicians, Better Government Associations and Law Enforcement Leagues loudly proclaimed that all these laws must be obeyed; that so long as they were on the books they must be enforced. They are, however, not enforced today—even though many of them have not been repealed. Theatres were forbidden in Boston, but there were plenty of playhouses in New York and the well-to-do who lived in Boston and believed in enforcing the law went to New York and attended the theatre there, just as they now go to Havana, Canada, Mexico and England for a drink. Later, theatres were built in Boston, at first under the pretense that they were not

theatres at all, but only lecture-halls. In them songs were sung and women walked on tight ropes. The people grew bolder and bolder as their natural impulses asserted themselves. The performers were prosecuted, but the juries acquitted them and judges began distinguishing what the law meant until it finally meant nothing.

Most of the other Blue Laws died the same way. The law compelled going to church on Sunday, but many people would not go. The law forbade sleeping in church, but they slept. Women wore ribbons and silks and curled their hair in spite of the law. Children were children, and played on Sunday. Occasionally, after they had been long ignored, under the impetus of a general housecleaning, some of the old statutes were repealed. But many remain on the books today; they are not worth repealing, for they are dead. They are like the rudimentary muscles which abound in the human body; they once did some kind of service, but the rest of the muscles found a way to get along without them, so they became useless and atrophied. They were not removed by a surgical operation, for it would have been difficult and superflous.

The poor laws of England which were more or less in force for three hundred years—from the Sixteenth Century to the beginning of the Nineteenth furnish abundant evidence of the way that arbitrary and cruel legislation may be forced upon the books by an active party serving its own interests. And, together with the labor laws of the same period, they show also the method by which the people get rid of such statutes. "Begging and idling" were strictly forbidden except upon special license by the authorities. "Sturdy beggars"—that is, persons who were able to work but idled away their time—came under the fierce condemnation of the law. Punishment of death for the third offense was enacted and thousands of people suffered execution. Still, in spite of the statutes and their steadily increasing penal-

penalties, it gradually grew impossible to convict, and they finally fell into disuse—long before their repeal. In 1530 Parliament passed a law confessing the failure of all other laws to accomplish the object aimed at.

Although this law provided for excessively barbarous punishments, it had no effect, and five years later Parliament passed another law.

But even this law had no effect. The statutes were constantly neglected and new legislation was passed without better results. Finally, the whole body of it fell into complete disuse. But it was not repealed until 1834!

With the rise of trades unionism in England drastic measures were taken against rebellious workmen. For one laborer to solicit another to join him in a strike was made a felony. Organizations of workingmen were driven into the woods and waste places to carry on their activities. These laws were made and enforced by landholders and by others who wished free competition between individual workingmen, that wages might be low; but in spite of jails and scaffolds the labor organizations grew and flourished until all the laws were nullified by disuse. It was only long afterward that they were repealed.

The English criminal code is filled with examples of the process of getting rid of legislation by disuse. Up to the beginning of the last century more than two hundred offenses were punishable by death in England, including loitering and loafing, petty larceny and poaching. The scaffold had its thousands of victims, but crime increased. Finally juries refused to convict, judges found excuses, the laws became dead letters, and eventually they passed into the rubbish heap. They were repealed in the end because they encumbered the books and no longer had any vital force. The humanizing of the English penal code came from the fact that juries would not convict. They were too humane and decent to obey the laws.

The history of the past is carried into the present. All our codes are filled with obsolete laws. The Fugitive Slave law was never obeyed in the North; it took more than a law to compel a humane white man to send a black man back to slavery. The Sunday laws today in many states of the Union forbid the publication of newspapers, the running of trains and street cars, riding and driving for pleasure, attending moving picture shows, playing any game, the starting out of boats on voyages, or the doing of any work except works of necessity. Nearly all these laws are dead, though they still remain on the books. They are dead because they do not fit the age. They are not now a part of the customs, habits and mores of the people. They could not be enforced.

After the Civil War the Constitution was amended to abolish slavery and provide equality between whites and blacks. Congress and most of the northern states thereupon passed explicit legislation forbidding any discrimination between the races in public places, such as hotels, theatres, railroad trains, street cars, restaurants and the like. But these laws, as everyone knows, are now openly ignored. The Negro does not go to the good hotels; he does not have good seats in the theatre; he does not enter the best restaurants; is not permitted to mingle with the whites, or to get what the whites believe belongs exclusively to them. This is not only true in the South; it is rapidly becoming a fact in the North. Custom and habit override the law because of the deep prejudice of the white against social equality with the black. Any effort to enforce these laws would bring serious consequences either North or South, and would no doubt injure the condition and standing of the black man, which can only be improved by a long process of education and growth. It cannot come from passing laws. All sorts of gambling is forbidden by the statutes of the various states. This includes betting and playing cards for money or prizes; it includes raffles even at church

fairs. Yet most Americans gamble in some way or other—and are not prosecuted.

The Anti-Trust act is a notorious example of legislation that is not enforced and cannot be enforced. Only a few prosecutions have ever been brought under it, and even when a prosecution has been successful ample means have been found to accomplish the desired ends in spite of the law. It has never kept Big Business from organizing and combining. It never can or should. Nevertheless, Big Business, through complaisant law officers and courts, has been able to enforce it against organizations of workingmen that engage in strikes. This is done in spite of the fact that it was passed in the interest of workmen and consumers and to control Big Business.

No one who has property believes in the tax laws. No one obeys them or pretends to obey them. When speaking of these laws no one shouts from the housetops the silly doctrine that a law must be enforced because it is on the books. No one even quotes the foolish statement of General Grant that the "best way to repeal a bad law is to enforce it." No doubt Grant was a good soldier, but he was never suspected of being a philosopher or an historian. The way to get rid of a bad law, which means a law obnoxious to large masses of people, is not by trying to keep it alive, but by letting it die a natural death. This is the way that society has always followed in dealing with unjust laws. The tax laws are a part of our civil and criminal codes, yet those who shout the loudest for enforcing prohibition never pretend to obey them. When a man argues that a law must be enforced so long as it is a law, or that the best way to repeal a bad law is to enforce it, he is talking about some law he wants enforced and not about a law that he believes is tyrannical and unjust.

It is much easier to pass a new law than to repeal an old one. Legislation which represents special interests or is demanded by organized associations which make a

great show of power before law-making bodies is seldom met by strong opposition. The force which demands the law is active and persistent; its insistence leads politicians to believe that a large mass of men is behind it. But when the statute goes into effect it may create serious oppression and violent disorder; it may come into conflict with the desires and prejudices of the majority of the people affected by it. But, once it is on the books, an active minority can easily prevent its repeal. It is only by the steady resistance of the people that it is eventually destroyed.

In spite of the common opinion, this method has always been the ruling one in getting rid of bad laws. It is Nature's way of letting the old die by opposition, neglect and disuse. If it were not in operation there could be no real progress in the law. If history were not replete with illustrations, if philosophy did not plainly show that this must be the method of society's growth, it would be easier to understand the people who so glibly argue that, whatever the cruelty or the hardship, the law must be enforced while it is on the books. A law cannot be taken off the books while it is complacently obeyed. Constant protest is the only manner that history offers the common people of having their way in the making and administration of the law.

All this, of course, does not mean that all laws are or should be habitually violated. The larger part of our criminal code represents the ideas of right and wrong of nearly all our people. But the sumptuary laws that regulate individual conduct and custom are never believed in by the great mass of the people. Men, unfortunately, are in the habit of being influenced by aphorisms and catchwords. We continually hear of "Law and Order," as if they always went together and law came first. As a matter of fact, order is the mother of law, and the law which seriously overturns habits and customs does not promote order, but interferes with it instead.

The enforcement of an unpopular law by drastic threats, by increasing penalties, by more cruelty, is not the administration of justice; it is tyranny under the form of law.

James C. Carter, one of the ablest of American lawyers, in a lecture delivered at the Harvard Law School, said:

> When a law is made declaring conduct widely practiced and widely regarded as innocent to be a crime, the evil consequences which arise upon attempts to enforce it are apt to be viewed as the consequences of the forbidden practice, and not of the attempt to suppress it; and it is believed that the true method of avoiding or doing away with these consequences is to press the efforts at enforcement with increased energy. But when a mistake has been made, its consequences can not be avoided by a more vigorous persistence in it. . . . An especially pernicious effect is that society becomes divided between the friends and the foes of repressive laws, and the opposing parties become animated with a hostility which prevents united action for purposes considered beneficial by both. Perhaps the worst of all is that the general regard and reverence for laws are impaired, a consequence the mischief of which can scarcely be estimated.

A great part of the misconception about the power of law comes from the assumption that the social group is held together by law. As a matter of fact, the group came into being long before the statutes. It formed itself automatically under the law of the survival of the fittest. The group is always changing in accordance with this natural law. Even statutes and courts are powerless when they stand in its way. To quote again from Mr. Carter:

> The popular estimate of the possibilities for good which may be realized through the enactment of law is, in my opinion, greatly exaggerated. Nothing is more attractive to the benevolent vanity of men than the notion that they can effect great improvement in society by the simple process of forbidding all wrong conduct, or conduct which they think is wrong, by law, and of enjoining all good conduct by the same means; as if men could not find out how to live until a book were placed in the hands of every individual in which the things to be done and those not to be done were clearly set down.

All laws are made, altered and amended in the same way. When a large class does not respect them, but

believes them to be tyrannical, unjust or oppressive, they cannot be enforced. It is a popular idea that the majority should rule. But this does not mean that the people should vote on every question affecting human life, and that the majority should then pass penal statutes to make the rest conform. No society can hold together that does not have a broad toleration for minorities. To enforce the obedience of minorities by criminal statute because a mere majority is found to have certain views is tyranny and must result in endless disorder and suffering.

A wise ruler studies the customs and habits of his people and tries to fit laws and institutions to their folkways, knowing perfectly well that any other method will cause violence and evil; he knows that fitting laws to men is like fitting clothes to men. The man comes first and both the laws and the clothes should be fitted to him. Instead of increasing penalties, stimulating cruelty, and redoubling the search for violators, he should take a lesson from Trajan, the Roman Emperor, as shown by his correspondence with Pliny. About the year 112, when the campaign against the Christians was in full sway in the Empire Pliny, who was the governor of a province, wrote to Trajan for instructions as to how to carry on the prosecutions. The Emperor replied: "Do not go out of your way to look for them."

## ETHICS OF NULLIFICATION[4]

The aphorism that disrespect for one law leads to contempt for all is equally useful to the drys, who argue that unrepealable laws should be enforced, and to the wets, who argue that unenforceable laws should be repealed. It was given expression in Hoover's inaugural address:

> Our whole system of self-government will crumble either if the officials elect what laws they will enforce or the citizens elect what laws they will support. The worst evil of disregard for some laws is that it destroys respect for all law.

[4] From article by Robert C. Binkley. *New Republic*. 58:297-300. May 1, 1929.

This statement raises a double question: on the one hand, is a margin of variation in enforcement consistent with self-government; and on the other, is the violation of unpopular or obsolete laws just as reprehensible as the breaking of laws that have the moral conviction of the whole community behind them? Is the nullification of a law to be regarded as a socially useful part of the total legal process, like repeal, or as mere law-breaking?

To the first half of each of these questions, which touch the foundations of government and human individuality, the partisans of enforcement return an impulsive and uncritical no: there must be no margin of variation permissible, and no difference between nullification and violation. But if we analyze this answer, we discover that it is merely a bit of doctrinaire guesswork, springing from a faulty understanding of our history, an artificial picture of our legal system, and a purely imaginary notion of human nature.

The theory that self-government is doomed when officers and citizens decide which laws are to be enforced is based upon a discredited view of free government: the doctrine of the separation of powers. This doctrine is a relic of eighteenth-century rationalism. It originated in Montesquieu's misunderstanding of the government of England. It has no roots in our history, but only in a foreigner's misconception of our institutions. It was a fashionable political dogma at the time the American Constitution was drawn up, but it was not then, and is not now, realized in the actual working of local government in Anglo-Saxon countries, and in these the local government takes care of most of the enforcement of criminal law.

According to the theory of the separation of powers, people can be assured of self-government only when their officials enforce blindly whatever laws their legislatures enact. There is no short-circuit allowed from people to administration. The popular will must be expressed through the legislature or not at all.

If this bookish doctrine were true, the only units of population that could make their will felt in public affairs would be those that happened to have sovereign legislative bodies. The smaller units, which take care of the enforcing of the law, would have only as much room for choice as the sovereign specifically allowed them. The law expressed by the legislative would be the "command of the sovereign," and aside from specific delegations of powers, there would be no elasticity or local variation in carrying out the sovereign's commands.

But the government that lives outside of books takes its course without much regard for the metaphysical thing called sovereignty or the precious distinction between legislation and enforcement.

Everyone knows that, in American politics, law-enforcement policies are openly voted upon in municipal elections. If the party that advocates strict law enforcement is defeated at the polls, those who are elected to office have a mandate from the voters to nullify certain of the laws enacted by the sovereign legislative authority. This control of the policy to be followed by local officials is an inherent part of the total legal and political process.

Prosecuting officials are equally sensitive to local pressure. In Kansas City, they secure conviction in one-third of one per cent of the cases of arrest for liquor-law violation; in the rural districts near by, they convict 25 per cent of the persons arrested. The judges in one region sentence a prohibition offender as if his crime were as serious as forgery; elsewhere they treat him like a careless motorist. All this goes on openly, the judges announcing in advance what punishments they will inflict. And back of all these permanent officials, there are the temporary instruments of enforcement, the members of the juries and grand juries. If they refuse to indict and convict, enforcement is impossible. The command of the sovereign goes unheeded.

From the standpoint of the abstract doctrine of the separation of powers, this margin of local freedom is no

doubt a deplorable anomaly. From the point of view of the doctrine of sovereignty, it is an inexcusable usurpation. But, actually, these practices conform to the great tradition of Anglo-Saxon self-government. Through all the changes that have marked the political path of the Anglo-Saxons from the tribal period to the present, local independence applying criminal laws has prevailed.

In the early Anglo-Saxon times each community defined its own law. The king administered justice in a limited class of cases, but it was the local law that governed these cases. By the law of Berkshire, a murderer forfeited life and substance; by the law of Urchenfeld, he was fined 120 shillings. At Lewes, the crime of rape was compounded for eight shillings fourpence; in Worcestershire, it could not be compounded. When, in a later century, Henry II sent his justices through the land, they would inform themselves of the law of the locality, and would base their decisions upon the information they received. Later the royal judges built up a system of law that was common to the whole realm; this was the Common Law of England. But local autonomy was not thereby extinguished: from autonomy in defining the law, it passed over to autonomy in enforcing it.

In the days of Queen Elizabeth, law enforcement was in the hands of the country gentry. From this class were recruited the Justices of the Peace, "full of wise saws and modern instances." Shakespeare knew the type. They enforced as much or as little of the law as they saw fit. If they happened to be strict Calvinists, they might even go beyond the law in trying to force the people of their districts to conform to the Calvinist virtues. They would fine the villagers for shooting at the butts on Sunday. The good Queen would write letters of protest, but she had no way of compelling uniform law enforcement. The local authorities simply nullified the laws that did not please them. This willingness to nullify law came to America in the Mayflower.

In Colonial times, the navigation acts were unenforceable in America, the region for which they were intended. Smuggling ranked with other commercial enterprises as an eminently respectable, as well as profitable, occupation. Public opinion sided with the smuggler. Attempts to enforce the law broke down because the local government authorities held the key positions. This story was repeated again and again in the history of our country. As it was with the fugitive slave law in the North before the Civil War, so is it with the fifteenth amendment in the South since Hayes' administration.

The autonomy of local government, in matters of criminal law, has not only survived the change from law-defining to a law-enforcing function; it has also weathered the transition from the old Anglo-Saxon system to Norman feudalism, from feudalism to squirearchy, and thence to modern popular government with its organized party politics. In the light of this historical perspective, it would appear that the only state wherein local nullification menaces self-government is one that exists in university class-rooms alone. Local discretion in enforcing laws is more clearly a part of our system of self-government than the doctrines of the separation of powers and of sovereignty, in whose names it is condemned.

From the doctrinaire point of view, one might still argue that these local variations are to be regarded merely as violations. This raises the question of the distinction between nullification and violation. What is the law, after all, and how can it cease to be law? If, in the state of New Jersey, the law against larceny is violated, and at the same time the prohibition law, or Sunday theater law, is disregarded, the doctrinaire will lump all of these offenses together as law-breaking. In assuming this attitude, he deliberately ignores all the elements of the legal situation except the formal facts of statutory enactment.

For the doctrinaire, though he may not know it, believes in the Austinian theory of law. That is to say, he thinks that the law is the command of a sovereign, and the sovereign a determinate organ of the state. The Austinian theory patterns a general definition of law upon the model of the most recent and superficial kind of law—the statute.

As against the Austinian conception, there is the view that law is a product of the internal development of the community, a function of its culture in which the essential element is consensus, not command. According to this more natural and general view, the statutory enactment is only one among many ways in which law is expressed and defined.

The history of law, not only in Germanic lands but in all places whose legal history is known, shows that the earliest law was based on custom, and was thought to be something that no human agency could alter. The legal system was kept up to date by forgetting old laws and remembering new ones into existence. There was no sovereign, no determinate organ, no command.

The invention of writing interfered with this automatic legal system by making it more difficult to forget old laws or unconsciously introduce new ones. When the law was once written down, innovations became conscious. Outright legislation came to be practised. The consequent revolution in our way of thinking has gone so far that we now look to new law to accomplish just those miracles of beneficence that our ancestors expected of the "good and ancient customs of the realm." While our legislatures grind out volume after volume of new laws, we continue to exclaim of this or that inconvenience, "there ought to be a law about it."

The invention of legislation, however, has not killed the original habit of forgetting an inapplicable law and developing a new consensus as to what is right or wrong. These processes still form a part of the living legal sys-

tem. There are whole classes of unrepealed statutes which are so obviously obsolete that any attempt to enforce them is regarded as freakish. A grand jury in Elizabeth, New Jersey, refused to indict a theater owner who was clearly guilty of violating the Sunday closing law, on the ground that "a change in conditions and customs makes the present law governing the moral life on the Sabbath more or less obsolete."

The doctrinaire view of law breaks down when confronted by three important kinds of statutes. Some are obsolete; others are opposed by the consensus of opinion in certain communities within the jurisdiction of the legislature which enacted them; and others are enacted without intention on the part of the legislators that they are to be enforced. With laws of these kinds the problem of nullification arises. And in each case, the Austinian doctrinaire would claim that the statute is the law; while the student of the practical workings of our jurisprudence would ask whether the statute is actually expressive of the existing law.

To identify nullification with violation of the law is artificial from the standpoint of jurisprudence; from the standpoint of psychology, it is absurd. The statutes that are nullified by obsolescence, local opposition, or lack of serious legislative intent are not confused in the minds of the citizens with the living body of the law. If the community is regularly and wilfully disregarding a law, the most casual conversation of the citizens reveals that the particular statute is distinguished from, not confused with, other elements of the legal system.

With statutes of this type there is no evidence that disrespect for law is transferable from one law to another. The mountaineer who shoots deer out of season does not drop into hog-stealing, nor does the average citizen who carries a hip-flask condone such offenses as arson, highway robbery, or rape. In fact, if the provisions of the penal code relating to these offenses were

repealed, the citizens would continue to regard them as crimes, and would probably devise extra-legal means of preventing them.

The violence that characterizes the bootlegger's trade does not arise from a moral indifference, leading the bootlegger to confuse in his mind the crime of murder and the crime of transporting alcoholic beverages. The violence results merely from the failure of the government to protect an industry that is outlawed by statute. The industry reverts to primitive self-help to protect property rights that cannot be defended in the courts or guaranteed by the police. It was not against the police that the gangsters armed themselves and developed their iron code. Their organization gives a rough and bloody substitute for law in a region from which the law has withdrawn.

The prohibition statute did more than create a new class of crimes; it abolished an old one. It made it illegal to sell, but legal to steal the forbidden liquor. The informal organization of the community then made compensation for the vagaries of the statute. Liquor larceny is still resisted and visited with punishment, though not by the police; the sale of liquor is still permitted, though not by the legislature. The speakeasies of New York often have signs tacked up behind the bar: "This place is insured against theft and dishonesty."

Just as the Volstead act legalizes deeds that the community continues to regard as theft, so the Jones act sanctions deeds that the moral sense of the citizens continues to condemn as murder. By increasing the penalty for liquor-law violations, the Jones law automatically puts the suspected liquor-law violator into the class of the suspected felon. An officer who witnesses the commission of the felony of transporting liquor—were it only in a hip flask—acquires at once the technical rights over the person of the offender that would be acquired by an officer who witnessed a burglary. If the felon

flees, refusing to halt when called upon to do so in the name of the law, the officer may kill him. The law will describe the deed as justifiable or excusable homicide. It may happen that the victim flees because he wrongly believes the pursuing officer to be a thug. Even this circumstance may not make the homicide a crime. But such acts, though legalized by statute, will be resented by the community as if there were no statute. A community terrorized by repeated outrages of this kind would probably develop such a temper that juries would acquit persons who killed prohibition-enforcement officers, or the offending officials might be subjected directly to mob vengeance. Fortunately, the adjustment of law enforcement to public sentiment takes place by way of the autonomy of the local community and nullification of the statute. The legislature cannot really give effect to its formal act to legalize murder, any more than it can make effective its enactment to legalize theft.

This experience with prohibition seems to demonstrate that there is something in the nature of law that a log-rolling legislature cannot touch by means of a statutory enactment. But the doctrinaire will still bring forth the objection that if everyone chooses which laws he will obey, the consequence is anarchy.

This is another of the objections based upon fiction—in this case, a fictitious notion of human nature. For human beings are not rational atoms, each utterly independent of the other and capable of entertaining any view, believing any doctrine, upholding any cause, that a speculative mind might invent for him. The opinions of men cannot be plucked up arbitrarily from their deep background. The same resistance that is offered to an unconsidered legislative act will also check these supposed attempts towards an anarchistic choice of laws to be obeyed or ignored.

The problem of law enforcement is so serious that we cannot afford to let our thought upon it derive from

discredited doctrines of politics and law, or from fictitious notions of human nature. The claim that disregard for one law induces contempt for all is misleading both as to the nature of law and the facts of human behavior. Just as the logicians of Galileo's day argued that there could be no mountains on the moon, since the moon was a heavenly body, the heavenly bodies were perfect, and the form of perfection was a sphere, so the contemporary doctrinaire contends that there is no such thing as justifiable nullification, since the law is what is enacted by the legislature, the legislature is the voice of the sovereign, and the sovereign cannot be guilty of self-contradiction.

No wise or practical policy towards legal reform is likely to arise from a theory that does not take account of justifiable nullification as an inherent feature of the total legal and political process.

## HOOVER AND LAW OBSERVANCE[5]

It is needless to waste words in painting the situation in our country to-day. The headlines of any metropolitan newspaper any day do so only too clearly. Crime of the most desperate sort is so rampant that unless a robbery runs into six figures or a murder is outstandingly brutal or intriguing, we no longer even read below the headings. We are no more interested than in a stock that does not move. We have ceased to expect criminals to be caught and punished. We accept the statement from Chief Justice of the United States that our criminal justice is a disgrace to civilization with the same lack of reaction with which we accept the Department of Agriculture's estimate of the cotton crop as about the same as was expected. On the other hand, tens of thousands of reputable citizens, who in all the private relations of life are decent and trustworthy persons, are daily

[5] From article by James Truslow Adams, Author, *Forum*. 82:2-7. July, 1929.

breaking one law or another. When a state has ceased to be able to enforce law, when its citizens have ceased to feel any sense of duty to obey law as law, when they have lost all respect for law enforcement and the courts and officials charged with enforcement, it is clear that something more than merely one amendment to the Constitution, however unwise, must be sought for as the cause.

In a previous article in the *Atlantic Monthly* I dealt with that heritage of lawlessness in America which is the historical background to any discussion of the question. I tried to show how, from the first settlement in the seventeenth century to the last rioting in Chicago, we have, for one reason and another—often political, sometimes racial, occasionally geographic, usually economic—developed a disrespect for law. Granted that background and granted, as must be, the truth of what Mr. Hoover says, what is the situation in which the patriotic citizen, anxious to obey the law of the land, finds himself today?

In the first place, there is the infinite number of laws and ordinances—federal, state, municipal—which Congress and forty-eight state legislatures, not to mention lesser bodies, are turning out literally by thousands every year. I have seen the statement that taking all the law, ordinance, and regulation making bodies in the country together, over twenty thousand statutes were passed in one year regarding railroads alone. Despite the fact that state boundaries are imaginary lines which have ceased to have any meaning for us in daily life, the laws of every state vary. The metropolitan area of New York City lies within three states. For some years I lived in New Jersey and worked in New York. I spent half my waking hours in one state and half in the other, and I lived under two different sets of laws relating to inheritance, taxation, and to innumerable other matters of daily concern. Had I commuted to Connecticut instead of to New Jersey, I should have had to learn an entirely

new set of laws and regulations, for ignorance of the law is no excuse for disobedience.

This anomalous condition is found throughout the country; in countless minor matters it is impossible to tell whether one is obeying the law or not. Motoring from New London to Providence, one must not run at *more* than thirty miles an hour, I believe it is, in Connecticut; but as soon as one has crossed into Rhode Island it is against the law to run at *less* than thirty. Traveling on the train from Buffalo to Chicago, it is legal to buy cigarettes for the first hour or two; but after crossing into Ohio (no one knows when or where) it becomes illegal for two or three hours until one has again reached the safety of Indiana. Before prohibition, it used to be legal for one to have a flask of whisky while going by train from Denver to Dallas—up to the imaginary line which separated some county in Texas from another, at which point one was a lawbreaker, and, as occasionally happened, could be hauled from the train and jailed. Ignorance of the law, as we have said, is considered to be no excuse. A law-abiding citizen who finds himself frequently breaking such laws feels none of the emotions which a reputable citizen should feel in such circumstances, and the fact that the situation is so obviously absurd insidiously breaks down the feeling that law as law should be implicitly obeyed.

Again, many laws are passed merely because it is the easiest way for lazy or supine legislators to rid themselves of noisy and fanatical minorities; likewise they may be passed by legislators who are simply ignorant or have some racial ax to grind. As instances we may cite the law prohibiting the teaching of evolution in Tennessee; the law recently passed by one of the Southern states, prohibiting the presence in any public or school library of any book "defining evolution" (which would rule out all dictionaries and encyclopedias); or the several so-called "pure history laws," penalizing the critical

writing of American history. Included also in this group are the broad censorship laws of various places, such as that which in St. Louis resulted in the seizure and destruction of a collector's rare edition of Boccaccio, and that which makes it illegal for book-stores in Boston to sell a considerable number of current volumes sold almost everywhere else in the United States. Living under laws like these, is it any wonder that the sober, law-abiding citizen has little respect for law as law?

But let us consider such a citizen facing some concrete problems. Personally I agree heartily with all that Mr. Hoover says. I have keen respect for law and believe that such a respect is an essential element in building up any civilization. For me, one of England's greatest charms is the fact that the entire community does have this respect and that anyone not an actual criminal feels a certain real disgrace in breaking any law. But what is the situation in America that confronts such a normal, law-abiding citizen? Is a citizen of Boston who wishes to know what is being written in contemporary American literature bound to deprive himself of knowing anything about a dozen or so important titles because it is illegal for a bookseller to furnish him with them? Or shall he surreptitiously import them from New York, or break the law and buy them furtively from a "bookleggeer" ? Shall a teacher in the state which prohibits dictionaries and encyclopedias in its schools and libraries throw those books out of the windows, or shall he give the students illegal use of copies hid in closets? Shall a man interested in Italian literature and the culture of the Renaissance leave a hole in his knowledge where Boccaccio should be, or shall he break the law and buy a copy?

In constantly passing back and forth from Europe, I am continually confronted by similar problems. In all enlightened countries over here not only are treatises on birth control by medical authorities to be had in the

bookshops of any city, but frequently public instruction is given in free clinics. If I take any such book home to New York, I become a lawbreaker and am liable to a year in prison or five thousand dollars fine. I am interested in modern literature and, although greatly disliking the book, I realize that Joyce's *Ulysses* is a landmark in its development. For the purposes of an article I am now writing I can readily buy *Ulysses* for five dollars in Paris or here in London (where I am working at the moment), but if I take it to New York to use there, I shall again be a law-breaker and shall again be liable to a year in prison or five thousand dollars fine.

Consider the question of possessing firearms in New York State. Any thug can readily procure a revolver by the simple process of going across the river to New Jersey and buying one; but it has become increasingly difficult and in many instances impossible for the law-abiding citizen who wishes to protect his home from the thug to get a permit. The Constitution of the United States says that the right of the citizen to bear arms shall not be abridged, but this has been abrogated by the "police power" of the states, so that we now have a situation in which any thug can get a gun but the sober citizen cannot. In fact, in a recent skirmish in New York which resulted in the killing of a policeman by thugs, it was found that the officer was acting as "guntoter" for a rival gang of thugs who had no desire to be caught with the tools of their trade—three guns—on their persons. Some years ago a concern with which I had relations had its pay roll of about five thousand dollars brought to the factory through a bad neighborhood every Saturday by a trusted employee. (This was before the breakdown in government had become so complete as to make it profitable for private companies owning armored cars to perform that service for business men.) Since there had been many holdups, the company attempted, unsuccessfully, to get a permit for the messenger to carry

a revolver. After a while it was discovered that the difficulty lay in omitting to tender the usual fifteen-dollar bribe to the police captain of the precinct. There was no use in carrying the matter higher. The company could not prefer charges, for in such situations there is never any proof. It had three options: to risk its five thousand and its employee's life by leaving him undefended; to break the law by bribing a police official; or to break it by having the messenger carry a gun without a license.

Recently one of my friends, driving a motor car in a large American city, was overhauled by a motorcycle policeman who told him, with foul language, that he had been speeding. As a matter of fact this accusation was not true, but it was the habit of this particular policeman to allow a car to get ahead and then by speeding after, to show a high rate on his own speedometer. My friend would have had no case had he gone to court and, what he minded more than a possible fine, a black mark would have gone against his driver's license. Knowing the situation, he immediately placed his hand on his wallet pocket. "Mind you," said the policeman, "I'm not asking for anything." "All right," said my friend, handing him ten dollars. The cop smiled and speeded off to wait for his next victim and bill. It must have been a profitable business. It is easy to say that instead of breaking the law by bribing an officer, my friend should have reported him. All I can say in reply to any enterprising private citizen is: let him try single-handed to clean up the police department of any large American city and see how far he will get.

When laws are just and wise, they ought to be obeyed and are likely to be; but when they are not, they open very genuine problems in ethics for the decent citizen. I wonder if Mr. Hoover himself, with his love of efficiency, his sense of organization and efficient government, to say nothing of his racial pride, would under all

observance of the circumstances insist upon an absolute obs[illegible]ance largely fifteenth amendment? Should the Negro [illegible] there outnumber the white in any state (in Mississip[illegible] would are already 935,000 Negroes to 854,000 whites), w[illegible]nt, he insist upon a strict observance of that amendme[illegible]y even if it resulted in a Negro government permanent[illegible] set up over the whites? The situation would hardly result in a nation-wide repeal of the constitutional amendment. If Mr. Hoover were a resident of the state, what would he do? Would he live under the Negroes, would he move away, or would he disobey the law? Many cannot move away, and even if they could, I doubt if Mr. Hoover would willingly abandon any considerable number of states to Negro republics.

Mr. Hoover speaks easily of the right of citizens who disapprove any law "openly to work for its repeal," but he must realize the inherent difficulty of this for unorganized individuals. In the first place, for some obscure reason in the American character, laws are rarely repealed; they are allowed simply to lapse in observance. It is far more difficult to get any legislature, including Congress, to take an interest and initiative in repealing a law than it is to enact one. Getting a law repealed may mean no less than educating an entire state, which may take a long time and which most certainly will require a large expenditure of money. In the second place, many of the laws to which the law-abiding citizen objects were originally passed either through ignorance of the electorate and the legislature or through the influence of an organized minority whose crusade was well supplied with funds by some fanatic angel. It is notorious how politically effective even a small minority may be if sufficiently active, well organized, and wealthy; and in most instances, the opposition—the people who feel oppressed by some law passed by the efforts of a minority—are both unorganized and without adequate funds. To overcome these handicaps takes time—a long time.

Today the power of the individual is largely lost. An enormous amount of money is necessary to place any movement before the public, as may be proved by a glance at the sums spent by the Republicans in the last campaign to elect even Mr. Hoover. Let me illustrate by an example. For a while I had an apartment overlooking the harbor in Brooklyn. The view was superb, but I soon found, as all others do there, that the place was rendered impossible by the clouds of oily, black smoke blown into our windows from the tugs and steamers in the river. Complaining of the situation, I was asked why I did not start a movement to remove the nuisance, and take advantage of the law which makes burning soft coal in the harbor an offense punishable by a five-hundred-dollar fine. The answer was obvious. I had to earn my living, and heading such a crusade was a full-time job. I should have had to abandon my work, organize a publicity bureau, spend large sums on postage and stationery, form committees, and so on through the whole usual business. The help to be derived from the city authorities was well indicated from the fact that the Municipal Building itself appeared to be, and I was told was, one of the worst offenders in the use of the illegal fuel!

Time to organize committees, money to make their work efficient—few people have either. And both are futile if the opposition is corrupt—and in power. A friend of mine in another city, which passed an ordinance prohibiting the use of soft coal, spent several thousand dollars installing smoke-consuming apparatus in his plant. One day, sitting at his open window and being covered with soot from the three chimneys of an ice plant not far away, he decided to try his hand at law enforcement. He called up police headquarters and, after explaining the situation, received as answer, "You mind your damned business and we'll mind ours." The plant was owned by local politicians.

It is all right for Mr. Hoover to say obey the law or work for its repeal; but what is a tug boat captain to do if all his competitors are saving money by burning soft coal, and if the government authorities not only do not enforce the law but break it themselves? Is he to abandon his business in order to organize an almost hopeless crusade to get the law changed or enforced, or is he to give up his business entirely? Is he to burn hard coal in competition with soft, or is he to break the law himself?

The subject can take us even further. The theory of our government—that the majority shall rule—cannot safely be stretched too far. It broke down in 1860, and may again. Indeed, in several respects it is not even the theory. A very considerable part of the legislation under which the people of our country live and do business has, in the last resort, been the determination of a single judge of the Supreme Court passing upon the constitutionality of laws by votes of five to four. It was shown lately that owing to the method of repealing clauses in our Constitution, three million people strategically located in the right states could block the will of all the rest of the nation. In such a case would it be the duty of the nation to obey the law?

Theoretically there is no justice in the doctrine of majority rule. It is a useful and practical method of carrying on popular government, but that is all. No better method has been devised, but there is something abhorrent in the idea of 51 per cent of the population being able to force its ideas on 49 per cent—of sixty-one million people governing fifty-nine million. The fact is that it cannot be done without the acquiescence of the 49 per cent, or, indeed, any considerable minority. Fortunately the minority usually does acquiesce, for it realizes that the importance of carrying on the government is greater than any temporary discomfort or even oppression caused by the decision of the majority. But we

must not lose sight of the fact that in the American system sovereignty is supposed to reside in the people at large, and that majority rule is merely an expedient for determining the will of the people. But if the will of a sufficiently large minority is deliberately and persistently thwarted by the majority, revolt of some sort is inevitable.

Even law-abiding citizens will not obey laws which are but partially and unjustly enforced. Our whole history has proved that. Would one-tenth of the merchants of New York pay duties on their goods if they knew that the other nine-tenths were allowed to import free? No—nor will citizens obey, or as juries enforce, laws with unjust penalties. How many juries under the Jones act will find a man guilty of taking a drink if the penalty is the same as for homicide? Nor will citizens obey laws, such as the smoke ordinances, which the government itself breaks. Nor will they obey laws which they believe thoroughly unjust and infringing on personal liberty. If disobedience to just laws leads to anarchy, obedience to unjust laws leads to tyranny, as our forefathers well understood and implored us to remember.

We will not develop obedience to law in America until we have educated both our electorate and our legislators to a knowledge of the nature of law, to the limits of laws, and to their effects; until we have educated them both to a tolerance and a practical wisdom in the art of governing; until we have cleaned the Augean stables of our public life of their accumulated filth, and the governments themselves—municipal, state, and federal—obey and impartially enforce the law; until public opinion and public prosecutors demand the punishment of millionaires and of highly placed officials in Washington with the same rigor as would be meted out to the ordinary criminal; until the ideal of quickly accumulated wealth, by any means whatever, is made subordinate to the ideal of private and public virtue.

## PROHIBITION AND NULLIFICATION [6]

In times of intense controversy over public issues, it is inevitable that political philosophy is subjected to extraordinary stress and strain. The ingenuity of the special pleader in developing new arguments for his cause stops at nothing, and antique doctrines are summoned back from oblivion, refitted to look like new, and sent forth to give battle. It is perhaps not surprising, therefore, that the ancient doctrine of nullification, which Daniel Webster consigned to the grave nearly a century ago, should have been disinterred in the course of the debate upon prohibition. It might be more accurate to call the present theory the descendant rather than the reincarnation of the old nullification doctrine, for the present circumstances have caused it to take a somewhat different and an even less defensible form.

A number of recent contributors to the better magazines, in discussions bearing directly or indirectly on prohibition, have given utterance to a form of nullification doctrine. These articles give evidence of an attempt on the part of some of the opponents of prohibition to give a philosophical reason for disobedience to law. Their purpose is not merely to show that prohibition is a bad thing, nor even that it should be disregarded, but to construct a quasi-legal justification for violating it.

It is not the purpose of this article to discuss in any way the good or the evil of prohibition. Its function is simply to point out the evil of one of the arguments that has arisen in the course of the protracted public debate. My protest is against bad political philosophy. The danger is that we shall acquire an undesirable by-product of the controversy in the shape of a troublesome political heresy.

[6] From article by Edward Clark Lukens, of the Philadelphia Bar. *American Bar Association. Journal.* 14:550-2. October, 1928.

Dr. Hadley, says:

> If any considerable number of citizens who are habitually law-abiding think that some particular statute is bad enough in itself or dangerous enough in its indirect effects to make it worth while to block its enforcement, they can do so. This process of blocking the law by disobedience is known as nullification.

President Hadley actually merely states a fact and gives it a label. He does not say that he approves of the process, but he seems to imply that the process, if not justifiable, is at least worthy of the dignity of a name that conveys the idea of a respectable political theory.

Some of the writers are less moderate. F. Lyman Windolph, under the title of "The Sanctity of Law" in the May, 1926, Atlantic Monthly, writes that:

> If sovereign power resides in the whole body of the people of the United States, it must follow, as a matter of politics, that those statutes which do not represent the popular will are not really laws.

George W. Martin, in "Liberty and Sovereignty" in the July, 1926, Atlantic Monthly, voices the same doctrine, but goes even farther, in that he expressly affirms the right of a minority to nullify a law.

> Sovereignty really resides in the will of the citizens—not necessarily in a mere majority, for numbers may be counterbalanced by determination, or passion, or intelligence, or education—and if the will of the citizens is not sufficiently predominant to overcome opposition and reasonably enforce the Government's mandates, then they cannot be considered as decrees of the sovereign.

We have in these two pronouncements a blunt statement of the proposition that the popular will is the law and that a law which is unenforceable is not really law at all.

One of these writers speaks of "the whole body of the people of the United States," the other with less moderation ascribes to a minority of the people the right to rule. Struthers Burt, who writes on "The Sense of Law" in the August, 1926, Scribner's, carries the thought

to its ultimate conclusion, and argues that each individual may judge for himself what is the law. He contends that "the average man, especially the man born under the Anglo-Saxon tradition," has ingrained in him the "sense of law," and that this "stands above all law, and all laws are subject to it and refer back to it," and that no governmental action can "make a so-called law the law unless it is the law to begin with."

The original doctrine of nullification, as developed by Calhoun, was that a state had the right to decide whether an act of Congress was constitutional, and if the legislature of the state held that it was in excess of the powers of the federal government, it could declare it to be a nullity within that state. It was a part of the "states' rights" doctrine, which rested upon the theory that the constitution was a compact between the states and not a form of government adopted directly by the people. As Webster showed, it rested upon a false premise, but at least it professed to be a theory in interpretation of the constitution and not in opposition to it.

While this doctrine set up the sovereignty of the states as opposed to the sovereignty of the people of the whole country acting directly in the adoption of a national constitution, the modern nullifiers oppose the people's sovereignty as expressed in the constitution by the assumed will of the same sovereign unexpressed through any regular political channels. The new nullification makes no pretense of interpreting the constitution, but rather attempts to set up the supposed popular will as superior to it. The South Carolina doctrine was enough to cause a civil war, but these writers, if it be assumed that they are not merely fulminating against prohibition, are propounding an anti-constitutional doctrine beside which the views of the late Mr. Calhoun appear as mild and gentle as the summer breezes.

Sovereignty, according to this school of political thought, reposes in "any considerable number of citi-

zens," or in a group of citizens not necessarily in the majority but perhaps endowed with great determination or passion, or in "the average man," at least if he happens to be an Anglo-Saxon average man. It may be that these expressions do not attain the dignity of a political doctrine, but when a number of respectable persons give public expression to the same idea, it may fairly be assumed to reflect an opinion which is not confined entirely to the actual writers. If it be true then that such a doctrine is taking root among us, it should be recognized and faced without waiting for it to become more firmly entrenched.

Respect for the modern spirit precludes the assumption that an idea is wrong because it seems radical, or that it is necessarily fallacious merely because it was once discredited. It must be examined afresh, and must stand or fall in the light of a present day analysis. The new doctrine of nullification, apart from any historical consideration, rests upon fallacy and confusion of thought.

One of its chief sources is the confusion of moral with legal rights, a failure to observe the boundary between the field of ethics and the field of political science. As Mr. Windolph ably demonstrates, there is not necessarily a moral duty to obey all laws. History is full of instances where human progress would have been retarded had not someone had the moral courage and vision to defy a law that was immoral. It is also true that the statute books are full of laws so petty and detailed that they have no moral significance one way or the other, and it is practically impossible to avoid breaking some of them. The extreme moralists of the "dry" side have increased this confusion by their assumption that a statute of itself creates a moral law. The nullifiers base their claim upon the equally fallacious converse proposition, that a statute which is unsupported by a moral law is not even a legal law. If the opponents of

prohibition were content with denying the moral sanction of the prohibition laws, and asserting their moral right to violate them, they might be right or wrong in fact, but at any rate they would not be guilty of confusing law and morals. They partake of the same fallacy that is indulged in by their extreme opponents when they leave this ground and say that because they can conscientiously break the law, and because enough of them break it, it is not the law. The word law is used in many different senses, but one cannot shift his meaning in the middle of his argument, and that is just what he is doing when he says that a law is not law if it is a bad one or an unpopular one.

Closely related to the confusion of law with morals is the confusion between the actual law and the law as it ought to be. The failure to make these distinctions goes back to the eighteenth century conception of "natural law," the product of a period when law, philosophy and theology were strangely mingled in the minds of the philosophers. The fiction that a Court, even in a case that has never arisen before, is not making law but is discovering and stating what the law always was, shows the enduring influence of the doctrine. Another legacy of it remains in the theory that law-makers should as far as possible seek to define and give force to existing rules of conduct rather than to manufacture laws out of whole cloth. The common law had its roots in customs, and many of our statutes are codifications of common law, or efforts to give legal sanction to rules already developed outside the legislative field. There is little doubt that this type of statute generally works better and enforces itself more easily than the type that represents invented law, and there is little doubt that as a matter of policy, legislative bodies would do well to bear this in mind. Of the various reasons why prohibition may have been unwise, this theory provides what seems the strongest.

It is quite another matter to say that when an act

has been placed on the statute books it is not a valid law. No legal distinction can be made between laws which codify the common law and laws which supersede it, between wise laws and foolish laws, or between popular and unpopular laws. What lawyer would take these distinctions into account in advising his client of his legal rights?

The extreme natural law doctrine was never able to meet the test of practical application. It was a doctrine of philosophers rather than of statesmen, and a manifestation of the peculiar spirit of the century in which it flourished. It could not survive the coming of a more matter-of-fact and analytical age. Mr. Burt with his "sense of law" is merely reverting to an obsolete philosophy which, while it conferred some incidental benefits, would, if taken too literally, have impeded progress.

To return to the question of sovereignty, the thesis of the nullifiers seems to be that the people are sovereign, therefore laws which are opposed by the people are not valid. The premise is correct. "We, the people of the United States," in the words of the Preamble, adopted the Constitution, and we the people can amend it or revoke it. The fallacy is in the conclusion. The means of exercising our sovereignty and expressing our will are provided in the Constitution itself. We can, in our sovereign power, throw overboard the entire system of registering our opinions by ballot if we so desire. Until we do so, the machinery of political expression provided in the Constitution is as much a result of our will as is any substantive law.

The modern nullification challenges the whole basis of free government, the exercise of popular sovereignty by ballot. Its proposition that the will of the people is superior to statute necessarily involves the assumption without proof of a state of the public mind which is contrary to the will of the people as expressed through the regular political channels. Perhaps its advocates

contend, as Mr. Windolph says, that in some cases "the machinery of representation has failed to function properly," but can they show that some other kind of machinery would function more reliably? Can they show that the will of the people can be more accurately determined by taking straw votes and by listening to gossip? Has there been any public demand that elections should be conducted by tabloid newspapers instead of at the regular polling places? Even if the nullifiers could show that some other system was better, they would have still to show that the will of the people wanted the better system. Until they can show these things, they rather beg the question when they speak of the will of the people as opposed to the law of the land at all.

The theory that widespread public disregard of a law impairs its legal validity, when carried to its logical conclusion, becomes a palpable absurdity. If the enforceability of a law is a criterion, not merely of its moral sanction or of its wisdom, but of its status as a law, there need only be enough violations in order to wipe it out. Under this doctrine, campaigns of organized disobedience would become an ordinary means of political action. A single person who should refuse to pay his taxes would be a lawbreaker, but if a large body of change in the law—should oppose the collection of taxes, the tax laws would cease to exist.

If a few people perjure themselves on the witness stand they are criminals, but if this evil grows to the point where most witnesses lie, it will become perfectly proper to do so, since the law against perjury will have been nullified. At some time during the process it may be doubtful whether the liars are sufficiently abundant to be transformed from criminals into nullifiers; then a few more will join their ranks, and all will be guiltless. Statistics of crime will be the only reliable measure of what crimes there are; those that are sufficiently popular

will no longer be crimes. Why are not the election laws "nullified" in some of the wards of Philadelphia, or the laws against homicide "nullified" in a certain suburb of Chicago, with just as respectable a flavor of pseudo-political philosophy as accompanies the "nullification" of the prohibition laws?

It is true that the will of the people is imperfectly registered and imperfectly carried out, but to adopt the doctrine of nullification would mean to abandon the whole structure of government by the franchise of the people. "Hard cases make bad law," and it seems that hard laws make bad political doctrine.

# PART IV

# PROHIBITION

## THE EIGHTEENTH AMENDMENT[1]

The eighteenth amendment was ratified by the legislatures of all the states save two. While the Supreme Court has construed the meaning of the other amendments incidental to its decision respecting statutes passed as a result of those amendments, the eighteenth has the distinction of being the only amendment whose validity has been the subject of direct attack.

I assume that every lawyer and most laymen are familiar with the decision of the Supreme Court in *The Prohibition Cases* (253 U.S. 350).

Notwithstanding the decisions of the court, the eighteenth amendment and its enforcing legislation is still the subject of much acrimonious debate. It is asserted by some, who should be in a position to know, that prohibition has been of incalculable value to our industries by reducing absenteeism and improving efficiency and production. Also that it has greatly promoted the general welfare and increased the savings of our laboring people. None can deny that temperance always makes for the prosperity of a country and for the health and happiness of the individual. Not even the most ardent opponents of the amendment have advocated the return of the vicious old-time saloon.

On the other hand, the crime surveys show that crimes of violence, especially in the urban centers, committed largely by bootleggers and beer runners, have

[1] From article by Silas Strawn, President, American Bar Association. *American Bar Association.* Report, 1928:174-6.

increased to an alarming extent. It is asserted that the existing condition conduces to a growing disrespect of all law, especially by our young people, to an extent that is appalling. Frequently we read of policemen and law enforcing officials being bribed and debauched and of innocent victims being shot down by over-zealous officers in their efforts to enforce the Volstead law.

Many of our representative citizens, who would not think of violating any other law, continuously violate the Volstead act, or conduce to its violation, by buying contraband liquors from bootleggers, thereby enriching the underworld beyond the dreams of avarice.

We cannot shut our eyes to the patent facts. It is obvious that thus far the efforts of the government effectively to enforce this law, especially in the urban centers, have not always been highly successful.

Every good citizen, particularly the lawyer, who is sworn to do so, ought to support the Constitution and obey the laws of the land. Either the Constitution should be obeyed or it should be amended, as the people may determine. It must not be nullified. Respect for the Constitution and observance of the law must prevail in this country.

Prohibition should not be a political question. It is perhaps the biggest social problem with which we are now confronted. To its sane and reasonable solution the non-emotional, clear-thinking, unprejudiced lawyers must give their best thought.

## REPORT ON OBSERVANCE AND ENFORCEMENT OF PROHIBITION[2]

Ever since the organization of this commission, on May 28, 1929, it has been giving careful consideration, among other things, to the question of the observance

[2] From Preliminary Report of the Commission on Law Observance and Enforcement presented to Congress January 13, 1930. Congressional Record. 72:(current)1562-4. January 13, 1930.

and enforcement of the eighteenth amendment and the national prohibition act. The problems presented have been numerous and difficult. While we are not ready to make a final report on the subject, we have reached certain conclusions which we are transmitting to you with this communication. The extent and complexity of the problem perhaps may be strikingly presented by reference to a few outstanding facts.

### I. Scope and Size of the Problem

As to observance: It is impossible wholly to set off observance of the prohibition act from the large question of the views and habits of the American people with respect to private judgment as to statutes and regulations affecting their conduct. To reach conclusions of any value we must go into deep questions of public opinion and the criminal law. We must look into the several factors in the attitude of the people, both generally and in particular localities, toward laws in general and toward specific regulations. We must note the attitude of the pioneer toward such things. We must bear in mind the Puritan's objection to administration, the Whig tradition of a "right of revolution," the conception of natural rights, classical in our policy, the democratic tradition of individual participation in sovereignty, the attitude of the business world toward local regulation of enterprise, the clash of organized interests and opinions in a diversified community, and the divergences of attitude in different sections of the country and as between different groups in the same locality. We must not forget the many historical examples of large-scale public disregard of laws in our past. To give proper weight to these things in connection with the social and economic effects of the prohibition law is not a matter of a few months.

As to enforcement, there are no reliable figures to show the size of the problem. But the reported arrest in the last fiscal year of upward of 80,000 persons from

every part of continental United States indicates a staggering number of what might be called focal points of infection. To these must be added the points of possible contact from without, along 3,700 miles of land boundaries, substantially 3,000 miles of frontage on the Great Lakes and connecting rivers (excluding Lake Michigan), and almost 12,000 miles of Atlantic, Gulf, and Pacific shore line. Thus there are about 18,700 miles of mainland of the continental United States at every point of which infection is possible.

There are no satisfactory estimates of the number of roads into the United States from Mexico and Canada. The number of smuggling roads from Canada is reported as at least 1,000, and on the Mexican border there are entrances into the United States at most points along a boundary of 1,744 miles.

To deal with an enforcement problem of this size and spread, the federal government can draw only on a portion of the personnel of three federal services, whose staffs aggregate about 23,000. Approximately one-tenth of this number is in the investigative section of the Prohibition Unit. Of the remaining 20,000, only a small proportion of the personnel is available for actual preventive and investigative work. The remainder is engaged in work far different from prohibition.

These figures speak for themselves.

### II. Administrative Difficulties

A frequent complaint is that the federal government is prosecuting small cases and not getting at those responsible for the large supplies of illegal liquor. To get at the smugglers, the wholesale distributors, and those who manufacture and divert on a large scale, it is necessary to have either an integration of the forces working at the supply and distribution ends or a close working relation between the two forces. With respect to both liquor and narcotics it is frequently stated by enforcement

officials and those who study phases of the problem that the Federal officials who deal with local or retail distribution upset many an investigation which might lead to the sources of supply; and, on the other hand, investigators who are dealing with sources are frequently ineffectual in getting at persons who control the sources.

To adjust the machinery of federal administration, as it had grown up for other purposes, to this huge problem of enforcement of prohibition is not easy and will require much further study. Unification, centralization of responsibility, and means of insuring cooperation between federal and state agencies are things to which we must come, quite apart from the exigencies of enforcement of prohibition, but which can not be achieved overnight.

### III. Legal Difficulties and Proposed Remedies

When we come to the legal difficulties in enforcement it is possible to speak with much more assurance as to what may be done at once by way of improvement.

Pending study of the whole subject, there are certain features of federal enforcement of the law as it stands with respect to which the testimony of judges, district attorneys, and enforcement officers is general and substantially unanimous. If on no other grounds than to give the law a fair trial, there are obvious and uncontroverted difficulties, abundantly pointed out by experience, which may, and, as we think, should be met so to make enforcement more effective. Summarily stated, these difficulties are due to (1) the division of enforcement between the Treasury Department and the Department of Justice; (2) the disordered condition of federal legislation involved in enforcement; (3) the possibilities of evading or defeating injunction proceedings, commonly known as padlock injunctions, by means of transfers and concealments of persons interested in property used for manufacture and sale of illicit liquor; and (4) the congestion of petty prosecutions in the federal courts,

requiring great delays, interfering seriously with general business, and leading to wholesale disposition of accumulated causes under circumstances impairing the dignity of and injuring respect for those tribunals.

Without prejudice to any ultimate conclusions, we think that in the interest of promoting observance of and respect for law the national prohibition law may well be strengthened and its effectiveness increased in these important particulars.

### (*a*) *Transfer of investigation and preparation of case to the Department of Justice*

There is very general agreement among those who have had to do with enforcement of prohibition that the whole task of enforcement through the courts, as distinguished from the granting of permits and administration of regulations as to the legitimate use of alcohol or of liquors, should be concentrated in the Department of Justice. It is an anomaly that the cases are investigated and prepared by agencies entirely disconnected with and not answerable to those which are to prosecute them. All experience of administration shows the importance of concentration rather than diffusion of responsibility. If prosecution, the legal side of enforcement, is partitioned between two distinct agencies, the diffused, ill-defined, nonlocated responsibility is sure in the long run to be an obstacle to efficiency. No doubt in certain special situations, where technical knowledge of a special type is involved and where the number of prosecutions each year is very small, it is consistent with a high degree of efficiency to have these few cases investigated and prepared by some body of experienced men in some other department and turned over to the Department of Justice for trial. But where the volume is so enormous and the circumstances are so varied as in liquor prosecutions, this is not expedient. To dispose of such a mass of cases satisfactorily there must be a well-organized

coordination of investigation and prosecution, which can only function effectively when under a single head, with responsibility definitely placed, so that there can be no falling down between two distinct bureaus and no lapsing at either point into a perfunctory routine. There must be careful study of how to separate the permit-granting work of the Treasury Department, which belongs there, from the work of investigation and prosecution, which shall all be done in the Department of Justice. But the principle of transfer of the latter to the Department of Justice is, we think, clear.

### (*b*) *Codification of federal legislation applicable to enforcement of prohibition*

Enforcement of prohibition involves resort to more than twenty-five statutes enacted at various times during forty years, many of them much antedating the eighteenth amendment. As they stand they are in form disconnected, unwieldy, and in much need of coordination and adjustment to each other. It has been urged upon us from many parts of the country by those charged with administering them, and we find it true on examining them, that they are much in need of being put in order, revised, and simplified. We recommend that all federal legislation applicable to the enforcement of prohibition be revised and digested with a view of making it a unified whole in the form of a simpler, better ordered, and hence more workable code. In our judgment this will make for much greater efficiency. As things are, it is sometimes far from easy for those charged with enforcement to find all the law bearing on their powers. Such things are all to the advantage of the commercialized lawbreaker who commands excellent advice on points which, at the crisis of action, the enforcement officer may have to look up hurriedly for himself. We recommend a codification of the laws on this subject as an important step toward better enforcement.

### (c) *Provision for making so-called padlock injunctions more effective*

Long before the national prohibition act it had been found that the jurisdiction of courts of equity to abate nuisances could be made a most effective way of dealing with many forms of vice. Nearly two generations ago this jurisdiction was applied to violations of state liquor laws, and it was later applied with good results to violations of laws against prostitution. The national prohibition law took advantage of this experience and provided for injunctions in causes where property was habitually used in connection with violations of that law. These provisions are well conceived and are capable of doing much toward making the law effective in action. But means of evading them have been discovered in certain limitations of procedure growing out of the need of serving process upon the persons interested in the property. By conveying some small fraction of the title to a nonresident, or by resident owners, landlords, or tenants concealing themselves and evading the service of process, such proceedings are increasingly rendered nugatory. We are advised that open, persistent, and extensive violators of the law have been enabled to escape so-called padlocking of their property in this way.

We think this grave defect may be met by a simple amendment adding to section 22, title 2, of the national prohibition law a provision that if in a proceeding under that section it is made to appear to the court that any person unknown has or claims an interest in the property or some part of it, which would be affected by the order prayed for, it may order that such person be made a party by designating him as unknown owner or claimant of some interest in the property described. It should go on to provide that such person and any defendant who is absent from the jurisdiction or whom, whether within or without the jurisdiction, it is impracticable to serve other-

wise, or who is shown to the satisfaction of the court to be concealing himself for the purpose of evading service of process or of any order of the court, may be served in accordance with the provisions of section 57 of the Judicial Code.

The use of injunction proceedings as a means of enforcement is so important that this provision for reaching unknown claimants, non-residents, and residents who conceal themselves to evade service of process would add very greatly to the efficacy of the statute. It contains nothing which is not already done in the states generally when private claims to property are concerned.

### (*d*) *Provisions for relieving congestion in the federal courts*

From various parts of the country come complaints of congestion of the federal courts due to the large volume of petty prosecutions under the national prohibition act. Obviously these prosecutions must go on. It would not do to create an impression that minor infractions are to be ignored. As things are, however, the congestion of prosecutions in the federal courts for minor infractions, caused by the necessity of proceeding by indictment in all cases, except for maintenance of a nuisance or for unlawful possession, is a serious handicap to dealing vigorously with major infractions and makes handling of the minor infractions perfunctory. It has done much to create a feeling in some localities that the law can not be enforced. In our opinion the delays and opportunities for escape from punishment thus occasioned may be and should be obviated.

Three methods to this end have been suggested: First, to increase the number of federal judges; second, to create inferior Federal courts, or, as it has been put, federal police courts, for such cases; and third, to utilize the present machinery of the courts, meeting the causes

of delay and congestion by a simpler procedure for petty cases.

There are constitutional questions to be considered in connection with both the second and the third of these proposals. The first does not involve any constitutional difficulties. But it leaves the cumbersome procedure by indictment, wholly inappropriate to minor infractions, in full force and multiplies the apparatus designed for great cases in order to deal with small ones. The objections to this method are palpable, and it should not be adopted if the situation may be met in some other way. So with the second. It involves some of the constitutional questions which must give us pause in connection with the third. But, what is more to be thought of, there are serious objections to multiplying courts. If it is possible to deal with this matter adequately with the existing machinery of the federal system, it should be done. We think such a solution entirely possible and in the right line of progress, not merely in the enforcement of the national prohibition act but of all federal legislation.

We think also that it would be expedient for Congress to define the term "casual or slight violations." Speedy convictions and certain imposition of penalties are important considerations, and are more likely to be efficacious than threats of severe punishment rendered nugatory by congested dockets overpassing any possibilities of trial in the manner constitutionally appointed for crimes of such magnitude. But this suggestion, made on general considerations applicable to all criminal laws, and out of abundant caution, may not be a vital part of the plan.

The Jones law was enacted to make enforcement more efficacious in two ways: (a) By providing for more severe penalties in the discretion of the court; (b) by making available the collateral consequences of a felony, such, for example, as the rules of law applicable to pre-

vention of a felony and the capture of felons. This was done by making every violation of the national prohibition act a potential felony.

The foregoing suggestions aim at preserving this feature of the existing law. Up to the time when the district attorney elects how to prosecute there is a potential felony. In other words, all the possibilities in the way of arrest and prevention which obtain under the existing law are conserved. But the intention is to make it possible in case of "casual or slight violations" (language of the Jones law) to prosecute as a petty offense, thus relieving congestion in the federal courts, maintaining the dignity of those tribunals, and making possible speedy disposition. As things are now, the cumbersome process of indictment must be resorted to even in the most petty case. The result is that large numbers of these cases pile up and have to be disposed of offhand by "bargain day" and similar unseemly processes. In any case which the district attorney elects to prosecute by indictment the judge will still have the discretion provided for in the existing law. If it is objected that a wide discretion is put in the district attorney by the proposed legislation, the answer is that he has that discretion already in effect, simply exercising it, not in the beginning by the mode in which he prosecutes, but later by including any particular prosecution in the wholesale disposition on some bargain day.

Thus, a few simple legislative enactments, in our opinion, could be made greatly to strengthen enforcement of the national prohibition law. Such measures, making it more adequate to its purposes, are suggested by study of material which has come to us from all agencies concerned with its administration. We think they could not in any wise interfere with any ultimate program which we may have to recommend, and would in the meantime advance observance of the law.

## LIBERTY UNDER LAW IN AMERICA[3]

In many communities efforts to prevent the enforcement of laws which are distasteful to a portion of the community have taken the form of electing enforcement officers who are pledged to a policy of non-enforcement. This is to be deplored and condemned. No law can be adopted without the concurrence of a majority of a legislative body, and in many states and municipalities a law does not become final without an opportunity for submission to a referendum. All efforts to nullify or abrogate an existing law which has been regularly adopted by a legislative body and declared constitutional by the judicial branch of the government strike a blow at the very heart of popular government, which must always rest upon the loyal acceptance of majority rule. It is because of such efforts on the part of large numbers of people, who are nevertheless only a small minority of the entire population, that our government has been placed on the defensive.

It is not easy to understand the political philosophy of those who cry out against the tyranny of majorities. Who are the persons who are loudest in their complaint of government by the majority? A survey of the field shows that they are either persons of radical views and tendencies or principals or representatives of predatory interests who are out of harmony with existing institutions and who are necessarily found in the minority. Commercial interests and opportunities for amassing wealth are somewhat curtailed by certain classes of laws and regulations, all of which are framed by the majority in the interest of all the people. It is apparently the view of the minority that their personal selfish interests are more important than the welfare of the community as a whole.

[3] From an address by Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio, at Chautauqua, N.Y. August, 1927. 15p. Citizens Committee of One Thousand. New York.

In any government in which the people rule and make the laws, where freedom of thought and expression are guaranteed, and where opinions differ, one or the other alternative is inevitable. Either the majority must prevail over the minority or the minority must prevail over the majority.

All these principles were carefully considered and well understood by our forefathers who framed the federal Constitution and laid down the principles which must be our guide in determining the relative rights of minorities and majorities, and therefore the relative rights of the government and the governed.

In all the field of subjects provided for in the Constitution, the convention required only five to be governed by a two-thirds majority of Congress; viz., impeachments, expulsion of members, passage of laws over the President's veto, ratification of treaties, and amendments to the Constitution itself. All other matters might be disposed of by a bare numerical majority. By the ratification of the Constitution the people of the states consented to be so governed. It is difficult to see how in any popular government substantial progress could be made if each step of that progress depended upon unanimous concurrence of thought and action on the part of all the people.

Laws are rules of human conduct and are designed to limit and to control the conduct of those who are out of harmony with standards adopted by society. If those standards can only be declared and enforced after all men are of the same mind, there is no longer need for regulation.

The Constitution is the foundation upon which our government is based, and since it provides that only five matters require the concurrence of a super-majority, all others being left to a bare numerical majority, the unwillingness of a portion to submit to majority rule is a thrust at the Constitution itself. Laws made by the majority

must become the laws of all the people, to be respected and obeyed by all. Any disposition on the part of any citizen not to obey any law, or on the part of any official not to enforce any law which does not meet with his approval or concur with his notion of proper legislation, is a step toward anarchy and revolution and trends toward the downfall of the Republic.

The Constitution was even more rigorous in the matter of making amendments to the fundamental law. The rights of minorities are so jealously safeguarded that constitutional amendments could not be made by a bare majority, but proposals must have the concurrence of two-thirds of both houses of Congress and the ratification of the legislatures of three-fourths of the states. In one hundred thirty-eight years more than three thousand three hundred proposals have been discussed, covering a great variety of subjects, but of this great mass of material only nineteen proposals have been adopted and these cover only eight distinct subjects. No federal amendment has ever been adopted as a result of sentimental hysteria or political propaganda, however strongly organized. No amendment has ever been effected without a prolonged controversy in which all phases of the subject have been thoroughly analyzed and the merits and demerits fully set forth. The failure to ratify the child labor amendment is an instance of the lack of majority sentiment, and the eighteenth amendment is an instance of overwhelmingly favorable opinion.

The discussion of the "tyranny of majorities" is largely based upon the eighteenth amendment and is fomented by predatory interests which suffer economic losses resulting therefrom. Yet that proposal had a large margin over the necessary two-thirds in Congress and within a few months received the approval of forty-six state legislatures, many of which cast a unanimous affirmative vote.

While the eighteenth amendment is not the only law which is being condemned and flagrantly violated, that

amendment furnishes the best illustration of the sophistry of the propagandists of so-called tyranny of majorities.

It must be remembered that at the time of the ratification of that amendment by forty-six states, thirty-two of the states had already adopted prohibition either by law or constitutional provision. Even in those states which had not adopted statewide provisions, there was local self-government, with the result that *fully* 95 *per cent of the entire territory of the United States was dry.* Approximately 68 per cent of the entire population lived in dry territory.

The remaining 32 per cent of the population, occupying only 5 per cent of the territory of the nation, were not satisfied to remain under local self-government with unlimited freedom in indulging their personal liberty. On the contrary, this minority made organized efforts to break down the prohibition laws of the 95 per cent of territory which was then dry. The 5 per cent of territory became so troublesome through processes of smuggling and propaganda that the 95 per cent of dry territory was compelled in self-defense to extend the principle of prohibition to the remaining 5 per cent. The wrath of an outraged public could not have been visited upon the 5 per cent of wet territory in the United States if there could have been found opposed to their action only thirty-three members of the United States Senate or one hundred forty-six members of Congress or two hundred members of the lower legislative assemblies of thirteen of the states.

The eighteenth amendment had a larger number of votes in the federal Congress, a larger number of states to ratify, a larger proportion of votes in the state legislatures, than ever concurred in any other constitutional amendment in American history. This was practically a unanimous vote, which could not be required or demanded as the general standard for amendment of the fundamental law.

Another ground urged by the opponents of prohibition for its open violation and attempted nullification is that it defines as a crime that which is not a crime and that it imposes restraint in matters which should be left to the choice of each individual.

The liquor traffic was not penalized by the common law, but it is the experience of civilization, especially during the last hundred years, that it has been the cause of more crime, insanity, poverty, unhappiness, misery, divorces, orphans, gambling, prostitution, corruption in morals, corruption in government, and disrespect and contempt for law, than all other causes combined.

As long ago as 1890, the Supreme Court of the United States, speaking through Justice Field, in the case of Crowley *vs.* Christensen, made this ringing declaration:

> The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. . . . By the general concurrence of opinion in every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source.

It is further said that the Volstead act declares that to be intoxicating which is not intoxicating in fact. It is therefore insisted that Congress should amend the Volstead act to permit the sale of beverages containing not more than 2.75 per cent alcohol by weight. There is not the slightest fear that Congress will make this concession or any other substantial amendment of the Volstead act, but it is interesting to note the reasons why Congress declared any beverage to be intoxicating which contained more than one-half of one per cent of alcohol.

It was necessary that the enforcement law should take into consideration the evils theretofore existing, the experience of the states in their enforcement acts, and the clear intent of the people as inferred from that experience.

It was found that fourteen of the states, in their enforcement laws, had prohibited beverages containing any alcohol whatever. Twenty-two other states had limited the alcoholic content of prohibited beverages to one-half of one per cent.

Congress found that the federal government, in its administrative branches, with the full consent and co-operation of the distilling and brewing interests themselves had fixed a standard of one-half of one per cent as one which would contribute toward effective enforcement of the license law. While the traffic in intoxicating liquors was recognized under license provisions, it was necessary for the protection of the liquor interest that some limitation be placed upon the alcoholic content of beverages claimed free from license. It was to the interest of the traffic while regulated and licensed to limit the alcoholic content of beverages to that percentage which would prevent unlicensed places from selling beverages which would intoxicate. Having then agreed that anything over one-half of one per cent is intoxicating, the liquor interests are morally if not legally estopped from now asserting anything to the contrary. Manifestly, there can be no definite determination of the alcoholic content which would intoxicate. This depends upon the person and the amount consumed.

At the time of the adoption of the Prohibition Amendment, the kind of beer which constituted 92 per cent of the business of the saloon contained not more than 2.75 per cent alcohol by weight. It is therefore beyond dispute that to permit the sale of beverages containing 2.75 per cent of alcohol would bring back by one stroke 92 per cent of the liquor business, and would nullify the

intent of the people as expressed through their representatives in Congress and the state legislatures.

The most serious feature of this entire subject is that certain persons high in the councils of the nation and certain other persons occupying positions of prominence in the social and educational life of the nation are advocating the abrogation of the law by common consent, which is only another form of advocating nullification.

Government grants certain rights and privileges of protection to life, liberty, and happiness, and it is a corollary to that principle that there is imposed upon the citizen the duty and obligation of obedience and respect to that government and its laws. No government is entitled to respect and in fact cannot long endure after confessed inability to enforce its laws. It is indeed unfortunate that an educator having supervision and control of more than twenty-five thousand students should attempt to instill such dangerous doctrines as abrogation into the minds of those under his charge and should further attempt to spread these doctrines through the entire nation. But much comfort can be derived from the fact that he is practically the only educator of prominence who takes that stand.

False notions of so-called personal liberty, which amount in the last analysis to unbridled license, have been nurtured until they have led to the further false notion that people should respect and obey only those laws which they approve and that they may condemn and defy the laws they disapprove. *The written laws do not provide a definition of personal liberty.* The unwritten or common law defines it as the power of locomotion without restraint unless by due process of law. *Every definition of personal liberty includes a reservation that the rights of others or of the public shall not be violated.*

We have an abundance of processes under our federal government and the governments of all the states to

guarantee and even to enforce the good conduct of all citizens; and yet it must be acknowledged that the best guarantee of good behavior lies in respect for law and reverence for the authority which declares the law. *Governmental institutions must rest for their final security upon the self-restraint of those who love liberty too much to destroy its essential foundations.*

All government implies restraint. This is true whether it be the regulation of home and family, the customs of modern civilization, or the statutory laws of the land. All government is dependent for its very existence upon those social qualities which prompt men to forego a portion of the natural liberty with which they were endowed for the benefit of the community at large. The ideal government, which governs least, must be blessed with a loyal citizenship which practices self-restraint to such extent that it needs the least possible measure of governmental restraint.

No law is a complete success. No human enterprise is without flaw. No human government meets the unqualified endorsement or measures up to the ideals of all of its citizens. All law is a restraint and an abridgement of natural liberty. It is the price we pay to society for the protection it affords us.

So far in this discussion I have dealt largely with the prohibition laws, not because these laws are different in their general character from other laws, but by reason of the larger number of sympathizers with their violation, they form a peculiarly apt illustration of the fallacies and sophistries of the doctrine of so-called personal liberty.

But there are other laws which are more often violated with greater harm to the public, though less discussed in public print and public places. I refer to the violations of the traffic laws, with their enormous toll of human life and limb and enormous property loss. The violations of gambling laws and the frauds and

embezzlements which follow in their wake. Violations of pure food laws with their resultant injury to health. Then I must not omit to mention that each of the states has approximately five hundred felony statutes and more than a thousand offenses in the penal code classed as misdemeanors.

More than ten thousand homicides are being committed each year. In England and Wales approximately one hundred murders are committed each year; in France approximately five hundred each year. It is estimated that not less than thirty thousand burglaries and fifty thousand robberies are committed each year in this country, as compared with only a few hundred annually in England and Wales and France. It is estimated that twice as many crimes and offenses are committed each year in the United States as in all the rest of North America, not including Mexico; all of South America; all of Europe, not including Russia and Bulgaria; although the combined population of those countries is approximately four times the population of the United States.

Another distressing fact is that a very large number of policemen and enforcement officers are murdered each year while in the discharge of their duties, while comparatively few of such murders are punished.

It may be conservatively estimated that not less than one hundred seventy-five thousand homicides have been committed during the past twenty years. Not more than twenty thousand are confined in prisons throughout the Union on convictions of homicides. After making due allowance for the small number who have paid the death penalty and for those who have died from other causes during that period, it is conservatively estimated that not less than one hundred forty thousand murderers are at large and unpunished in the United States. It may be assumed that the great majority of this number are pursuing lives of crime. This number is almost twice as

great as the aggregate number of policemen throughout the cities of the Union. It is much larger than the entire aggregate of our state militia; it is much larger than our standing army. It is conservatively estimated that not less than five hundred thousand men and women are pursuing lives of crime. This is a larger number than all the teachers, male and female, in all our schools below the grade of high schools. Five hundred thousand are discharged each year from our penal institutions. This is the annual turnover of crime. Five hundred thousand persons each year who are out of harmony with our institutions and who have broken our laws each year turned back into the stream of citizenship, where each and every one of them may cast a ballot which will offset the ballot of the most conscientious and high-minded citizen.

One of the difficulties of this period is chargeable to that class of our citizens commonly called good citizens. It can best be described as a low standard of morals. Morality itself is on the defensive before the bar of public opinion. Unfaithfulness to public trust, disregard and contempt for the oath of office, and dishonesty of the private citizen have shaken the confidence of man in man. Standards which prevailed ten years ago no longer prevail. Actions which, if performed ten years ago would have been stamped as immoral, dishonest, or criminal, do not now shock the majority of our people. Many persons classed as good citizens, and who would deeply resent any imputation against their honesty, do not hesitate to defraud the customs laws on returning from a foreign trip, or to make a false property or income tax return, or to sell merchandise by means of fraudulent advertising, or to violate the gambling laws or their marriage obligations, or boastfully to flout the eighteenth amendment.

To the question whether our laws can be enforced, there is only one answer, and that in the affirmative.

tive. If they cannot be enforced, then our government has become one of men and not one of laws. If they cannot be enforced, then the law is no longer supreme and life, liberty, and property are no longer safe but have become the prey of the criminal classes. If our laws cannot be enforced, we have become a government of the majority by the minority. *If certain of our laws cannot be enforced, none of our laws can be enforced.* If we cannot enforce our laws, no nation can enforce its laws and civilization will have reverted to chaos and anarchy.

If the question is whether they *will* be enforced, the answer lies with the people. It is quite certain that they will never be perfectly enforced. It is for the people to say whether they will be reasonably enforced. In our cities and municipalities we have one policeman to approximately one thousand inhabitants and they are usually able to maintain peaceful conditions. This is so only because the large majority desire peaceful conditions. The mere existence of a policeman without force is sufficient for the purpose.

Citizens may be compelled to do right, but it is equally important that they be taught *to desire to do right.* And this must come about not alone through compulsory obedience to law, but through voluntary respect for law and reverence for the authority which declares the law.

The law may be loved a little because it is felt to be just. It may be feared a little because it is severe. It may be hated a little because it is sometimes out of harmony with social ideas. It must be respected universally, because it is felt to be a necessity.

## OBEDIENCE TO LAW[4]

I shall not take issue with the Senator upon the question that there are violations of the law. I know that. I certainly shall not take issue with him upon the question

[4] From speech of William E. Borah, of Idaho, in the Senate of the United States. *Congressional Record.* 70:(current)3783-7. February 18, 1929.

that the law has led to corruption. I know that. I call his attention to the fact, however, that there never has been a law with reference to liquor placed upon the statute books of any civilized nation on the earth that the liquor forces did not undertake to break it down, to violate it, to undermine it, and to corrupt the officials. It is the history of liquor legislation from the beginning until this hour. It is not within the ingenuity of the human mind to devise a liquor law that will be satisfactory to the liquor interests. They are seeking to do with this law what they sought to do with every law. I do not care where you go, when it was, or how you undertake to deal with it; we had the same condition of violation, of corruption, of deceit, of fraud that we have now in regard to this matter; and as I shall undertake to show in a few moments, every system of dealing with liquor at the present time is having to meet that exact problem.

I repeat, there is violation now, there is corruption now, there has always been violation, there will always be corruption whenever a liquor law is advanced and put upon the statute books and undertaken to be enforced. What the liquor interests crave is the right, uncontrolled and unhampered, to prey upon the human race to its full insatiable appetite.

I wish that violation of law and corruption of officials were confined to the liquor problem. What a fortunate country this would be. I wish, as we survey the situation, that we could feel that only with regard to prohibition or enforcement is there violation or crime. Unfortunately it is not so. What are the violations of the liquor law compared to the corruption—the saturnalia of corruption in this country in 1921, 1922, and 1923 of the highest officials, men most responsible in government —with corruption permeating out through the entire country; apparently more money involved and more taken in one transaction than these pilfering thieves in

the department of prohibition would take in a hundred years.

Perhaps this arises to some extent out of a condition that followed the war. Let us hope so. We find it in other countries. We find it remarkably strong in other countries. Let us hope that it is a condition which followed the war.

Yet, when we make that allowance, we must refer to one thing more, that is, unfortunate as it is and humiliating as it is to admit it, the United States has not yet learned the science of enforcing its criminal laws. That is today the greatest and most profound domestic problem, in my opinion, in this country the application and the enforcement of the criminal law, not done with reference to prohibition—that is but one department—but with reference to the entire scope of human activity undertaken to be covered by the law.

Underlying this entire question is the fact that the American people must gird themselves for the supreme task in civilization, and the crucial test of a self-governing people; that is, whether or not they can enforce the laws which they themselves write. That is the test of a self-governing people, whether the people can enforce the rules which they lay down for themselves.

In one sense I am not surprised that there should be this disregard of law throughout the United States. We have a class of individuals—fortunately there are none of them in the Senate, the people are too careful about that—we have a class of individuals in this country, learned gentlemen, who seem to regret that their ancestors ever came to this country, who are engaged constantly in attacking the first principles of free government, and now they would lay down the rule in this country that if an individual does not like the law he has a right to violate it, to disregard it, to join with others and nullify it. They have laid down the rule that if I do not like a particular provision of the Con-

stitution I need not appeal to my fellow countrymen to repeal it, but I may violate it and disregard it.

In one of the leading magazines of the United States, an old magazine of high standing, I read an article in which I find this—

> He who obeys a law which is wrong contributes by that to the final debacle, the intensity of which is increased because delayed by that obedience.

"The man who obeys a law which he does not think is right." Who determines whether or not it is right? Who determines in this country whether a law is right or wrong, and how is it determined? Do individuals determine that question? Are there one hundred seventeen million individuals passing one hundred seventeen million judgments on a provision of the Constitution?

The fathers were too wise for that. They provided that the Constitution could be amended in a certain way, and when it is amended, that is a determination that what is contained in the amendment is right under our form of government, until the people in the same way revise their judgment and determine another course; and a man who teaches that an individual has the right to determine for himself is a traitor to the institutions framed by our fathers and maintained by our forebears. I do not care what his standing may be—lawyer or professor—or for whom he may presume to speak, he is disloyal to American institutions.

> If a large number of citizens are convinced that an act compels them to live lives of hypocrisy, cowardice, and servility, they will feel no moral obligation to observe the law. On the contrary, they will develop an esprit and morale in the breaking of it in the name of patriotism.

Are you surprised that the ordinary bootlegger, looking up to those of learning, perhaps able to read the literature of the day, finds that he is pursuing a course marked out by those who assume to speak with authority? Are you surprised that the young men or the young

women, inclined, perhaps, to disregard the precedents of their father and mother, find here in the literature of our country a statement that they may go counter to and disregard the laws of the land?

Ah, Mr. President, the able Senator spoke of the moral law. Let us appeal to it here. Let us invoke it here. The highest evidence of morality in a republic or a democracy is to observe the law which the majority have written. There is no morality that can be governed by political principles if that is not true.

Then this author says, in concluding his atrocious article:

> The nullification of the fugitive slave law developed men like Abraham Lincoln.

What a miserable slander, what a cowardly implication, telling the young people of this country that Abraham Lincoln built his character and his career upon disregard for the Constitution of the United States.

Lincoln said upon one occasion—I quote from memory—"I hate slavery"—using a word which seldom fell from the sacred lips of the martyr. I never saw it except with reference to slavery.

> I hate slavery; but it is in the Constitution of the United States. It is protected by the provisions of the Constitution of the United States. So long as it is, it must be protected. Therefore—

Said he, and I quote, I believe, almost his exact words—

> we are in duty bound to preserve that Constitution in letter and in spirit.

When he came to be inaugurated President of the United States out here in front of the Capitol, his last plea before the dread carnage of the Civil War broke, and brother was arrayed against brother, hero against hero—the last plea of the martyred Lincoln was that the northern people respect the Constitution of the United

States, give the southern people their fugitive slave law, and enforce it, as the Constitution of the United States obligated them to do. Yet there is circulated here as a part of the literature of the day the statement that the then President of the United States was an advocate of lawlessness, an advocate of the violation of the Constitution of the United States.

Let me read another statement. A lawyer of Connecticut—I understand him to be a member of the Connecticut bar in good standing—has written a book upon Constitutional government and the duty of the citizen, particularly around the Volstead Act and the Constitution of the United States, particularly the eighteenth amendment. Let me read from this book, which is being circulated now by an organization which is engaged in trying to convince the people of the United States that the eighteenth amendment cannot be enforced. This is what I find in that book:

> The eighteenth amendment is void in so far as it purports to give the United States authority over intrastate business. The decisions of the Supreme Court of the United States which purport to authorize the transfer of police power from the states to the United States under the eighteenth amendment are not binding upon the state or its people.

If I were going to reach out and get a man who ought to have this $10,000 fine and five years' imprisonment applied to him, he is the first gentleman I would hunt for. I would punish, if I could, the man who teaches violence rather than the poor creature who listens to and practices such teachings. I believe in free speech, but I believe when a man preaches a doctrine that is disloyal to his government, he ought to take the responsibility for having abused free speech. He may urge repeal, he may urge change but defiance to law ought to bring shame if there be no way to punish.

We are not the only people in the world who are struggling with the prohibition question or with the liquor

problem. They have it, for instance, now in Italy. Not many Americans agree with Mussolini as to his political philosophy or his methods, but we have to admit that he is getting results. Perhaps the particular environment amid which he works necessitates some methods and some principles with which we would not be in accord.

In surveying the situation in Italy, in trying to rehabilitate and reinvigorate the Italian people and to restore them to something of their ancient prestige, this marvelous man came up against the liquor problem and realized at once and without hesitation that it is one of the things with which Italy had to contend.

Upon a certain occasion in a public address he gave a number of figures and facts as to the deplorable condition in Italy, and stated unmistakably that the problem would have to be dealt with in a drastic way. He referred to the fact that the death rate through alcoholism was excessively high. He further referred to the fact that mortality and insanity and suicides due to the use of liquor were progressing at such a rate that the Italian people could no longer disregard the problem. Then he said:

> From these figures you will perceive that the picture is black and tragic and merits our deep attention.

The first thing he did, which is a more simple process in Italy, was to close twenty-five thousand saloons overnight by an imperial decree, if I may be permitted to use the word "imperial' in connection with Mussolini. He closed twenty-five thousand saloons and gave assurance that that was the first step in ridding his country of this evil which was at war with the moral and economic life of the Italian people.

We are not the only people who are struggling with it. It is a world-wide problem working its devastation and its ruin in all countries, and the problem is what are we to do with it? In England it is now one of the

vital issues or problems. They discovered some time ago that in 1927 the liquor bill of England was $1,506,000,000, and that the profits made out of those who drank it was $120,000,000. England, with one million five hundred thousand unemployed, with her superhuman burden of taxation, struggling for her economic life, found that she was expending $1,500,000,000 for liquor and paying somebody a profit of $120,000,000.

England has tried in every way to deal with this problem except that of absolute prohibition, which is now being discussed. They undertook in the first place to close the saloons earlier in the day. They found that the saloons or the liquor traffic paid no attention practically to the regulation. They then undertook to reduce the amount of alcoholic content. They found that that did not have the desired effect.

Then they went into a town of considerable size and purchased the entire liquor interests, purchased all the means and methods that they had of supplying it, and undertook to demonstrate in that way what they could do by government ownership. What was the result? As usual, invariably the liquor traffic began to break down the little experiment in that town alone. They bootlegged liquor in every possible way, and that experiment, of course, has failed to demonstrate, therefore, what government ownership could do under proper circumstances.

But it is the same old law, the same old rule. It does not make any difference what you do or how you try or how small your efforts may be, wherever the liquor traffic can fasten its fangs upon progress, progress dies.

Let us take one more illustration. Over in Canada they had prohibition in a number of provinces; I have forgotten just how many. Then along came the moderates, those who said that "man has to have some liquor. Get rid of the bootlegger. Get rid of corruption. Get rid of destroying our young men and our young women. Therefore let us adopt government control."

The argument in Canada was that by this method they would be rid of those things which my able friend thinks we can be rid of in this country by going back to state rights. We will examine that in a few moments.

What happened under the Canadian liquor law? Let us go first to the official record. I have referred to this elsewhere. I have been accused of being misinformed. Mr. President, I am not misinformed. I was over in Canada last summer and the summer before. I am not misinformed.

The British Columbia liquor board reports:

> Since the opening of the beer parlors the sale of "hard liquors" has increased 50 per cent. As much liquor is sold by bootleggers as is sold in the government stores.

That is the way Canada got rid of the bootlegger. It does not make any difference, I repeat, what we do; the lawbreaker is there.

The Quebec liquor commission said:

> Sale of hard spirits increased 32,275 gallons in one year. Drunkenness among women has increased 53 per cent.

These are official reports and not denied, except outside of Canada. The Saskatchewan liquor board said:

> The sale of hard liquor increased 33 per cent in the last two years. Bootlegging increased in this Province 111 per cent in the first year.

The Alberta liquor board said that 60,000 permits were issued the first year; two years later, 144,000 permits. The greatest problem is moonshine bootlegging. Four million gallons of liquor were sold in the second year without control.

During the first four months of government control the Ontario board said that 220,440 permits were issued and people were buying liquor at the rate of $1,000,000 a week.

Mr. President, let us turn to a different source than the official record, and that is to the representatives of

the church. I am not going to take members of some organization which has for its particular purposes the advocacy of prohibition or the liquor law, but call upon those who are interested from the standpoint of Christian ministers. Father Lavergne, speaking of government ownership in his paper said:

With due respect to those at the head of our government I must say that since they have become the advocates of beer and booze and have set the seal of the government approval upon drinking, they have almost annihilated the work of the church through years of preaching temperance and sobriety.

An effort at true temperance!

Cardinal Begin said:

You know what a vigorous battle we have fought for the virtue of temperance in our diocese, our beloved coadjutor and the group of ecclesiastical and lay apostles who have aided him in his efforts. After about fifteen years' work they had almost conquered the enemy, and we were overjoyed in forseeing the end of the destruction caused by the excesses of alcohol. But alas, there is now spreading everywhere the intolerable abuse which we denounce, and in particular the surreptitious fabrication of an alcohol more harmful than any other to the health of the body and the soul.

Let us turn to the newspapers. They are a source of information. The Vancouver Sun said:

The people decided on a policy of restricting alcoholic consumption to the lowest possible degree. The government has made this piling up of revenue the chief purpose of the act. Moderation does not moderate. Government control does not control. The British Columbia liquor system has actually failed.

Sir Hugh McDonald, son of the famous John A. McDonald, said:

There is just as much unlawful drinking under the government control act as there ever was under prohibition. The present law was in the very nature of things difficult of enforcement. It was far less difficult to secure convictions under prohibition than under government control.

The World, published at Vancouver, said:

Rum runners, gunmen, thugs, and all the parasites which thrive on the miasma of the underworld of the Pacific coast are

fostered by the policy now in force. Calculations show that bootleggers in this province handle as much liquor as the government stores.

Hon. H. H. Stevens, a public official, said:

Never in the history of this country was bootlegging comparable in magnitude and murderous results to what it is to-day.

Now, Mr. President, let us take a description of the liquor depot in Canada.

The Montreal warehouse of the Quebec Liquor Commission contains nine acres of floor space and is full of vats, tuns, and hogsheads of alcoholic drinks from its topmost floor to the cold basement underground, where wines are kept. Two large rooms of this building are used for storing the seized wet goods and stills that are constantly being taken from Montreal bootleggers, smugglers, and proprietors of blind pigs.

There is not a problem involved in the situation in the United States that is not involved under the system of government control of liquor in Canada. They have the same bootlegger to contend with, the blind pig, the poisoning of liquor, and all the corrupting influences that we have in the United States.

Attorney General Craig recently said:

Seventy-five per cent of the troubles of law enforcement are now due to the illicit sale of beer and most of that is due to the brewers that furnish the supplies and abuse the privileges granted to them under the government liquor control act.

Rev. Father Coyle, of St. Mary's Cathedral at Kingston is quoted as saying:

It is appaling the extent to which drinking is indulged in by young men, even boys of 'teen age. The drinking habit has reached an unbelievable stage.

There is no end to the story. They are having the same fight under government control that we are having under prohibition, and that is, to restrain those who never propose to be restrained by any law.

I said in the beginning that this is not a fight of ten days or ten years. Neither, in my judgment, are the evils which accompany our effort peculiar to the method

which we have employed. It does not make any difference how we shall undertake to deal with it—we shall have the same evils to contend with.

The Senator from Missouri, with his usual candor, said that he was in favor of going back to state rights; that he was in favor of giving this question over to the control of the states. Of course, Mr. President, that means the saloon. I do not believe the Senator from Missouri believes in the saloon; I do not believe anybody any longer believes in the saloon.

Let me digress long enough to say that while we have for many years been disposed to jeer at the temperance reformers, at those who are advocating prohibition, I think they have accomplished one thing: They have gotten rid of the saloon. I do not think anyone wants to go back to the saloon. That is one monument to those who were spoken of so long as cranks, as fanatics. They have convinced the American people that the saloon is intolerable; that it is a cancer upon the body politic; that it cannot be tolerated; and no one, I presume, wants to go back to it. However, Mr. President, would the temperance reformers have ever closed the saloon by moral suasion? Good as they were, and noble as were their purposes, effective as they were in their appeal for needed reform, how long would it have taken the temperance reformer to have closed one saloon by moral suasion, by appeal to the moral law?

We had to invoke the law somewhere in order to incorporate and crystallize the effect of the work of these people for seventy-five years. The moral influence and the moral suasion and the preaching had their place, and let them never be abandoned; but there must be something more, and that is the law and the authority of the government back of the law. That finally resulted in the destruction of the saloon, and, in my opinion, if we go back to the states we shall inevitably go back to the saloon in some of the states; when we go

back to the saloon in some of the states the result will be that we will go in all the states.

Mr. President, I live in a state which was bone dry according to law before the eighteenth amendment was adopted, but there was no way by which the people of Idaho could protect themselves from those states which were not dry. The people who are now urging their belief in state rights—I am not speaking now of individuals, but of the liquor interests—in no sense respected the right of Idaho to be dry. They shipped their wet goods into the state over the border, established their saloons within five feet of the border, and supplied the state in a way that the state was powerless to prevent. State rights was then not so sacred in the eyes of the liquor interests as it is to-day.

It is true that the able Senator from Missouri secured the adoption here of an amendment to a bill which provided that when liquor was shipped into a state it became subject to the control of the laws of the state. By a majority of the Supreme Court that provision of the law was upheld, but the court also held that while one could not ship liquor into the state there was no power to prevent one from shipping it across the state, and we discovered that when the liquor started it never got across. It was impossible to enforce the law with all the states whose people were engaged in the liquor business undertaking to break it down.

Suppose we should let it go back to the states, and suppose the state of Missouri adopted the old system, how should we protect the border states? We should have to have spies; we should have to have policemen; we should have to have the militia to protect the four borders of the states if we expected the law not to be violated by those who intended to have liquor cross the state line. There is no more reason to believe that they will respect the borders of the state of Idaho than that they will respect the Constitution of the United States.

Mr. President, do what we will and try as we may, we have these evils to contend with. They are a part of any effort to undertake to control or deal with the liquor problem, and I had rather undertake to deal with it by the government of the United States having to protect only the borders of the United States than having forty-eight states undertake to control four times forty-eight boundary lines.

The Senator from Missouri referred to the awful condition with reference to the use of narcotics. He is quite right; it is one of the most alarming situations with which we have to deal; but has not the man who wants a narcotic the right to have it? If we have no right to deny a man the right to have liquor, what right have we to deny him the right to take narcotics? One may be more dangerous than the other, but the question of individual liberty, of individual right, to my mind, is precisely the same. But we do deny it, and we deny it upon the theory that when an individual indulges in a practice which is harmful to the community or to those who are dependent upon him, it becomes a subject for the consideration of the public, and the public has the right to determine what the rule shall be.

I noticed the other day that the Prince of Wales, almost on the point of becoming the ruler of his kingdom, though fortunately the exigency passed, concluded to go out and visit the poor of England. He was astounded at the condition which he found among his people; he was moved to pathos when he found eleven and twelve people, men, women, and children, boys and girls, huddled in one common room, sleeping together like so many swine, with all the finer things of life driven out. It shocked the Prince. I read in a newspaper that while he was on his visit there came home a father with seventeen cents in his pocket. When asked where the other part of the fifty cents was which he had earned for the day, he stated that he had left it at the grog

shop. Do you tell me, Mr. President, that government has no duty and no power to protect the hungry children who were waiting for the fifty cents to supply the food for which their pallid lips were pleading? In a republic whatever the community determines is essential to the public welfare binds you and binds me during that time. If we do not believe in that rule, we do not believe in a democracy.

## NEED TO ENFORCE RESPECT FOR LAW[5]

We are told that the prohibition statutes cannot be enforced. It is natural that uninformed people who utter immature conclusions should say such things. Expressions from such sources carry small weight and do little or no harm. But such utterances have come from a few whose opinions usually merit attention. This is harmful. Therefore, it is worth while to actively combat all such ideas in order that they may not be accepted. They have no foundation in fact. The difficulties of enforcing these statutes at the outset were many and unusual. They sprang from imperfections in the statutes or the administration of the statutes (such as I have suggested above); from the usual imperfect functioning of an enforcing body in course of organization; from the practical conditions present when those laws went into effect. All of these elements are transitory in character. The statutes will be strengthened where experience demonstrates weakness. No one expects any criminal statute, no matter how drastic its penalties or how perfect its enforcement, to absolutely prevent commission of the crime. Liquor will be no exception. Illicit distilling is no new problem. The circumstance that it may now be more profitable than formerly does not change its character.

[5] From article by Kimbrough Stone, of the United States Circuit Court of Appeals. *American Bar Association. Journal.* 8:162-5. March, 1922.

No more lucrative criminal trade can be imagined than counterfeiting money. There, money is made direct and is of such slight bulk that it is easily conveyed and concealed. Yet, so efficient is the enforcement of the statutes against counterfeiting, that it is no longer very attractive to criminals and it has been reduced to a minimum. The United States has never yet failed in the enforcement of its criminal laws. With patient, tireless pursuit, which no distance could weary and no stretch of time lessen, it has followed the criminal across the seven seas and brought him back finally to punishment. It will not fail to cast its relentless net over the smuggler on its border or the "moonshiner" and bootlegger in its midst. It proves lack of knowledge of criminal history in this country and of the proven efficiency of the government, to say these laws cannot or will not be enforced. It is puerile to say and foolish to believe. Let the public be reminded of this history and of this efficiency that they may take pride in the power of their government and that they may not take these spreaders of false doctrine as seriously as those gentlemen take themselves.

There is a last place, where active public opinion can be very useful, to which I wish to draw your attention. A considerable number of persons seem to regard violations of the prohibition statutes as "conventional" crimes. They do not violate them but they furnish the incentive for others to do so. No contraband liquor would be made or smuggled or sold unless there were buyers. The class to which I refer now are the buyers. There are too many men who think themselves respectable, yet consider it quite "smart" to buy contraband liquor. School boys, on Hallowe'en, commit petty trespasses and we smilingly excuse them as pranks of boyhood. But grown men, like St. Paul, should "put away childish things." At least, the public should not smile upon their conniving at criminal things. Violators of proprieties, like violators of laws, are ready with defenses. These buyers of the

sacred "hooch" tell us they do so to vindicate their personal liberty. The reasoning of these gentlemen is perfect. Forsooth, God gave them stomachs and connecting mouths to put things in. Bar them from pouring therein what they will and, 'tis as clear as "moonshine" in the jug, their heaven-given Liberty lies at their feet. The "lie" is there, my friends, but 'tis not Liberty that does it. This cry is so familiar that it seems an echo of another, scarcely still. How recently we heard the fierce demand for liberty of speech from those who sought to interfere with our effective conduct of the war. And yet, if we accept the reasoning of the "bootleggers," those howlers proved their case beyond a doubt; for God had given each of them a mouth wherewith to speak. Their error is the age-old one—confounding liberty with license. How closely liberty is bound to license when our appetites knit them together! How twin-like smile they at us from the mirror of desire! They sometimes seem so much alike that it requires *sober* thought to tell one from the other. These warped and twisted views of liberty will fool none but these gentlemen. We do not see, in them, the patriot salvaging the torch of liberty. They do not well assume the character of Vestal Virgins to that sacred light. We know that the one thing, beyond all others, which the bootlegger and "bootleggee" dislike is light. No flame is half so modest as that under the illicit still.

Away with such sophistries! Let us look facts in the face. It is just as wrong morally to buy contraband liquor as it is to sell it. I am not sure but that it should be made just as criminal. I am certain that it cannot be respectable. When it leads, as it always must, to violations of the laws of the country, it is too serious to be lightly passed over. Let no man think he can be decent and worthy of respect who is a party to violations of the law of the land. He cannot be the customer of the bootlegger and escape the taint of such association. In

connection with these statutes, the ability of this nation to enforce its criminal laws is being challenged now, as it has never been before. Any man who contributes to the criminal side of the contest throws his weight against his government. He is, in no true sense, a good citizen and public opinion should regard him at his true value. It should place him exactly where his own acts put him. Public opinion can make such men respect the law.

There are those who say that the situation will take care of itself. They tell us that the turbulent times, just ended, have stirred the waters of society to their lowest depths, and, as a consequence, the dregs which long had lain upon the oozy bottom, have swum upward through the confused waters to the surface: that now, when peace has come and quiet with it, those noisome things will soon sink backward whence they came, and all will be serene again. There is some truth in what they say—unhappily, not much. Such dregs have never yet sunk to the bottom of their own intrinsic weight. They are carried and held there by the purifying agency of law enforcement; as toxic floats, within the waters of a settling basin, are seized and carried down by purifying chemicals. Remove the potency of that efficient agency and they will float upon the surface in a noxious scum, poisoning the waters upon which they ride. A policy of *laisser faire* solves no such problem as is here. Such passive outlook is but on a field of clouds whereon no foot can firmly rest. This is a time for action.

I do not join that class, who batter at our ears, with cries for strict enforcement of each tiniest law in all its minute parts; and yet, I offer no apology for such as do not so enforce the law. What I desire, here, to emphasize is, that when crime has dared the law to combat upon any field, there let the fight be without quarter until Law stands undisputed master of that field. But no kind of serious contest can be won without the unseen forces, the forces which are imponderable and yet which

outweigh all the rest. Society is thus like Nature, of which it is, indeed, a part. The lightening, but its unseen fingers tear the rock apart: The wind roars, but its invisible hand rips up the oak and hurls it at the scurrying clouds. So, in human affairs, there is an imponderable human agency of resistless power. Take all the other factors in the game; give me the weight of aroused public opinion and I will mash you to a pulp. This is the force we must have behind the Law in its contest for supremacy.

## FALLACIES OF PROHIBITION[6]

The object of any Constitution like ours is to place beyond the reach of the ordinary processes of legislative change certain fundamental features of the government and certain fundamental rights of the people. The Constitution of the United States undertook to do this, and nothing more. It provided a certain framework for the federal government which it created; it fixed the limits of the power of that government, as distinguished from the state governments; and it guaranteed certain essentials of liberty and property.

Into this great instrument there was injected for the first time by the eighteenth amendment matter of a wholly different kind—not only a different kind but the opposite kind. Whether prohibition is right or wrong, wise or unwise, it is certainly a denial of personal liberty; and to entrench a denial of personal liberty behind the mighty ramparts of our Constitution is to do precisely the opposite of what our Constitution—or any constitution like ours—is designed to do. The Constitution withdraws certain things from the immediate control of the majority, withdraws them from the province of ordinary legislation, for the purpose of *safeguarding liberty;* the

[6] From article by Fabian Franklin, Journalist. *Forum.* 82:218-23. August, 1929.

eighteenth amendment seizes upon the mechanism designed for this purpose, and perverts it to the diametrically opposite end, that of *safeguarding the denial of liberty.*

The old Constitution—the Constitution as it was before the eighteenth amendment—not only contained no prohibition of drink; it contained no prohibition of any personal act, however criminal. It left the question of crime to be dealt with by ordinary legislation. It contained many prohibitions; but in every instance its "Thou shalt not" was addressed to the government, state or federal, not to the citizen. The object in every case was to set limits to governmental power, in no case to control individual conduct. It contained no prohibition of murder, or arson, or forgery, or perjury, or robbery; it contains no such prohibition now. The only personal act that the Constitution of the United States makes a crime to-day is the manufacture, sale, transportation, or importation of intoxicating liquor.

There is one crime with which the Constitution does deal—the crime of treason; but it deals with it in a way that brings out only the more clearly the spirit of the whole Constitution. Treason stands apart from all other crimes in that it aims directly against the very existence of the constituted government; it might therefore be supposed that in the case of treason the Constitution would naturally depart from its position in regard to crimes in general and lay down a positive law concerning it. But even in dealing with treason, the Constitution does nothing of the kind; on the contrary, its provisions on this serious crime are directed solely to setting limits to governmental power.

Even in the case of the crime of treason, the sole concern of the Constitution is to protect individuals against the excesses of governmental zeal or popular frenzy.

Resistance to the enforcement of national prohibition has its source in many causes; but the moral backbone of that resistance has been supplied by the passionate resentment aroused by its gross perversion of the Constitution and its flagrant violation of the principle of state self-government which has been the very life blood of our institutions. From the very first moment that this resistance manifested itself, it has been the boast of prohibition spokesmen that the law could never be repealed because it was embedded in the Constitution, and that no amount of discontent or condemnation on the part of the people of great states like New York or Massachusetts or Wisconsin could avail to effect any relief; but this contemptuous arrogance, far from quenching the spirit of resistance, has served only to make it more intense, more widespread, more determined. Nor can it ever be otherwise, unless or until the American people shall have lost all trace of the spirit of liberty and completely forgotten the history of their own institutions.

In dealing with the question of prohibition, it is well that Mr. Hoover's commission should recognize its connection with the more comprehensive problem. But to overstress that connection would be an infinitely more disastrous error than to ignore it altogether; and this for two distinct reasons. In the first place, the prohibition problem differs from the general problem of law observance and law enforcement in such vital ways as to require a wholly different diagnosis and a wholly different treatment. And secondly, the broader problem is so vast, the difficulties that beset any serious attempt at dealing with it are so immense, that to let the prohibition wound continue to fester until those difficulties are overcome is a counsel of despair.

It is perfectly true, as Mr. Adams says, that there are a great many laws which are generally recognized as unwise, which are accordingly held in no respect, and which, instead of being repealed, "are allowed simply to

lapse in observance." But nowhere does he give an example—nor could he give an example—of a law of this kind which enlists the constant attention of the authorities, which the authorities strain every effort to enforce, and which accordingly gives rise to a nationwide struggle between the law on the one hand and millions of violators of the law on the other. Nor is the prohibition situation singular in this outward aspect only. It is equally singular in its inward nature; for these millions of breakers of the prohibition law, including a large proportion of the most intelligent and most high-minded of our people, do not experience the slightest sense of guilt in breaking the law. It is in the instance of prohibition, and in no other, that vast multitudes of our people are definitely arrayed against a law which our government is making a constant and strenuous effort to enforce. To treat this portentous situation as a mere part of our familiar experience of law-laxity would be like treating the Mississippi flood as if it were a mountain freshet.

The difference in character between the prohibition problem and that of general law improvement is not more marked than the difference in its urgency. Perhaps I may here be permitted to remark parenthetically that, much as I have written in opposition to the eighteenth amendment, I have never charged it with having created the "crime wave" of which we have been hearing so much during the past half-dozen years. I have even expressed doubt whether there has been, in any true and grave sense, any such thing. Government statistics, so far as I have observed, do not bear out the notion. The statistics suffice to do away with any possible claim that prohibition has reduced crime; but they do not indicate any such alarming increase of crime as it is customary nowadays to allege. But, whatever may be the exact facts, and however anxious we must all be—and should have been these many years and decades—to remove the disgrace of our crime record, it is an extravagance to

speak of it as in any sense a menace to the foundations of the nation, or even to the general welfare. We should give ourselves up to a worthy effort to deal with it—an effort comparable with that which we make in dealing with physical disease. But the reduction of the crime rate, important as it is, is no more essential to the integrity of our national life, no more vital to the preservation of our civic ideals, than is the reduction of the death rate from tuberculosis or cancer.

Far different is the prohibition situation. The eighteenth amendment, with its sequels—the Volstead act and the Jones act—has not only generated a vast crop of crimes of violence by bootleggers and hijackers, of lawlessness on the part of enforcement officers, of contempt for the law on the part of millions of good citizens, but has introduced into our civic life a division of feeling which is charged with an enormous potentiality of evil.

No division comparable to this has been known in our country since the slavery question was settled. We have had political battles over the tariff, the currency, League of Nations, and so on. But, however high feeling may have run in these matters, they were issues which everybody looked forward to seeing disposed of in the normal course of things. Moreover, they did not enter into the very fabric of daily life as does the prohibition issue; people were stirred up about them when elections were coming on, and then dismissed them from their minds until the next campaign.

This was not so with the slavery question; it is not so with the prohibition question. As for slavery, there gradually arose so intense a feeling between North and South that it finally became evident that the problem had to be settled if the country was to survive. The North was finding it more and more intolerable that human beings should, in any part of the country, be owned as chattels by other human beings; the South was finding it more and more intolerable that an institution which it regarded as essential to the well-being of the

southern states should be threatened with extinction by the northern states. It came to be more and more widely felt that this state of things could not continue permanently without destroying the Union; that, as Lincoln put it in a memorable speech, "A house divided against itself cannot stand."

The division of feeling which threatened the very life of the nation, and which culminated in a gigantic Civil War, was the result of deep-seated historic causes, in the face of which the wisdom and patriotism of three generations of Americans found itself powerless. I do not say that the division which prohibition has created threatens the very life of the nation, as did the slavery issue; but no one who seriously considers the situation can fail to see that it impairs in the most serious way the spirit upon which our whole-hearted devotion to the institutions of our country depends.

This is a situation that demands treatment not as part of a comprehensive program of legislative and judicial reform, but as an urgent, a vital, an immediate need of the nation.

Everybody, including the most intense opponents of prohibition, is perfectly aware that if all men obeyed the law, or if the law could be enforced effectively, decently, and without outraging the instincts of multitudes of good American citizens, the crying evils of the present situation would not exist. But it is not "confused thinking" or "unsound argumentation" to ascribe to a law the evils which it inevitably produces. To judge of the desirability of a law by the way it would operate if everybody acted as we should wish them to act, is truly to be guilty of "confused thinking and unsound argumentation."

Mr. McBride says:

> What confusion would exist, what disorder would result, what a tangle of conflicting action would paralyze us if we attempted to operate on the theory that any law may be ignored at the discretion of any citizen or public official. It would mean the end of lawful liberty, of security, of coöperation for the general welfare and every objective for which our government was formed.

But no opponent of the prohibition law advances—or implies—any such theory. To hold that "*any* law may be ignored at the discretion of any citizen or public official" would be worthy only of an imbecile; to hold that there are *some* laws which may rightly be so ignored is a very different thing. Whether the prohibition law is such a law or not is a fair subject for discussion; but when a man asserts that it is, he does so precisely on the ground that the law is not like "*any* law" but is in flagrant violation of the basic principles of our institutions and a tyrannical exercise of governmental power. It would have been perfectly proper for Mr. McBride to try to prove that this charge against the prohibition law is not well founded; but to attempt to dispose of it by knocking down a silly theory that nobody advances is a performance almost too childish to be dignified by the name of fallacy.

The third instance of fallacy to which I wish to call attention is one in which the unsoundness is not so obvious. Toward the close of his article Mr. McBride volunteers this comment:

> Should the eighteenth amendment be nullified because it cannot be repealed? Nonsense! The procedure for amending the Constitution has not been changed. The prohibition amendment can be repealed in exactly the same way that it was adopted.

This is a favorite answer of prohibitionists to the complaint that the eighteenth amendment has embedded in the Constitution an almost irrepealable police regulation. "It took us fifty years to put the amendment into the Constitution," they say, "and you can't complain if it will take you fifty years to get it out." This may sound plausible; but in reality there is no parallel between the two cases. What the prohibitionists waited fifty years to get was a law imposing their will upon the rest of us; what we are asked to do is to submit to the restraint which they have put upon our liberty. *They* were not asked to submit to *our* notions as to how they

should live; nobody sought to compel them to drink, or to put upon them any restraint whatsoever. Prohibitionists may have waited fifty years to get their law, but there was nothing else for them to do. They were not asked to obey or enforce a law which they resented as odious, but only to wait a long time before they could get a law enacted which millions of their fellow citizens do so resent. The question of how long it may have taken to establish a tyranny has no relation whatsoever to the question of how long those subjected to the tyranny should be content to endure it.

From the very beginning the eighteenth amendment was treated with contempt, the Volstead act for its enforcement violated without compunction, by thousands of our best citizens. But it was not until several years later that public attention was in any notable degree expressly directed to the doctrine that such disregard of law is in some instances the right, and in some instances even the duty, of the citizens of a republic. In the past four or five years the doctrine that there are limits to the obligation of law observance has become familiar to millions of men and women who had never before thought of such a thing.

It is easy to account for the slowness with which this doctrine gained currency. For the general principle that all laws should be obeyed is a sound and even a necessary one, and to weaken its hold on the people at large is to assume a grave responsibility. Of those who from the beginning *acted* upon the conviction that there was nothing wrong in breaking the prohibition law, very few were willing to make public avowal of that conviction. Most of them were doubtless not quite clear in their own minds about it; and of those who were, nearly all refrained from open expression of their conviction either out of timidity or out of genuine scruple—that is, either because they did not wish to incur odium or because they really felt that more harm than good would come

from the dissemination of the doctrine that not all laws are entitled to obedience.

Nor is it difficult to explain the change that has taken place in the last few years. That change is simply part of the general development of the great struggle. When it became clear that opposition to the eighteenth amendment was not a matter of mere passing discontent, but of a hostility as serious and resolute as it was widespread; when year after year, instead of witnessing a mitigation of the struggle, saw the lines drawn ever more and more sharply; when the resistance with which the law was met led to ever greater extremes in the measures put through or proposed by the prohibition leaders; when, in short, it became plain that we were confronted with a conflict as irrepressible as was the conflict over slavery seventy-five years ago—then it became a clear duty to look the question of the obligation of obedience squarely in the face.

And when this question, taken in the abstract, is looked squarely in the face, only one answer is possible. The doctrine that *every law* must be obeyed, no matter how oppressive, no matter how inhuman, no matter how silly, is one that no sane man, when driven to a direct answer to a plain question, will maintain. It is safe to say that the heads of the Methodist Church would no more admit the moral obligation of a law requiring them to perform or to attend the rites of the Roman Catholic Church than the heads of the Catholic Church would admit the moral obligation of a law forbidding the performance of those rites. But it is not necessary to cite hypothetical cases. Everyman draws the line somewhere: to do otherwise would be to degrade the principle of obedience to law to the level of an abject superstition.

On the concrete question of our prohibition law, there is of course room for the widest possible difference of opinion. The considerations that justify the defiance which it has encountered—on a colossal scale in action

and on a constantly growing scale in the expression of opinion—have been in some slight measure indicated in some parts of this article; to go into them more fully would be beyond its scope. But I cannot close without expressing, with all the earnestness at my command, my sense of the deplorable consequences of this defiance of law. Those consequences do not follow, or follow in but slight measure, when laws become obsolete or obsolescent by something like unanimous consent; they do not follow when, even though the law is not obsolete, its violation occurs only sporadically, or as the result of laxity or thoughtlessness rather than of a deliberate attitude of contempt or hostility toward the law. But when the spectacle of such contempt or hostility, on the part of something like half the nation, is constantly before the eyes of the people; when, intensely as this is objected to by advocates of the law, thousands of our best and most intelligent citizens witness it without a word or sign of rebuke; when this state of things results in weakening the hold of the principle of law observance upon the general mind—then it needs no argument to show that the consequences are very serious and must be more and more serious, year after year, so long as these conditions continue.

To defy a law, however bad, which has behind it the full authority of the government is a course which may be necessary, but it is inevitably attended with great evils. Not the least of these evils is the effect it must have upon multitudes who, seeing this course adopted by men of the highest standing but not capable of understanding the ground of it, *do* actually commit the error which Mr. McBride imputes to acknowledged leaders of anti-prohibition opinion—they do not distinguish between disobedience to a law on the ground of a vital principle which the law violates and disobedience to it simply because of dislike or disapproval of the law. For this gross aggravation of the spirit of lawlessness, as well as

for the creation of a portentous division of feeling throughout the nation, the eighteenth amendment is responsible. It is idle to contend that these things would not have happened if the people had been wholly different from what they actually are. A law may be ever so noble in motive and yet be pernicious in effect. It is not by the motives of its proposers, but by its actual working —above all, if that working is manifestly the result of fundamental causes—that a law must be judged. And judged by that test, as well as by the general principles of rational lawmaking, the eighteenth amendment stands hopelessly condemned.

## REPEAL THE JONES ACT![1]

Apparently we shall have to learn again the old lesson that "eternal vigilance is the price of liberty." During the past century we have been so occupied in building our nation materially that we have had little time to consider questions of government. In fact, we have all but forgotten them—perhaps because our liberties have not heretofore been seriously menaced. To accept the principle of the eighteenth amendment would be to repudiate the whole basis of our constitutional system. Let it stand as a precedent and the door is thrown open to more shocking invasions. There will remain no limitation, either practical or theoretical, upon the exercise of the amending power.

But, say the supporters of prohibition, whether right or wrong, it is now law, and as such is sacred and entitled to the blind and unreasoning respect of all citizens. Sanctity of law is the superstition invoked by every despot to support his throne. In its name freedom of belief is suppressed, slavery is promoted and maintained, and, today, the liberty of citizens is destroyed by sump-

[1] From article by Frederick R. Coudert, Jr., New York. *Forum.* 82: 98-103. August, 1929.

tuary legislation representing views oppressive to great communities. This superstition is the same in origin as the divine right of kings; it has merely taken the modern form of the divine right of the sanctified fifty-one per cent.

Obviously, some principle of authority is necessary to an orderly administration of society. Quite as obviously, the principle of absolutism is not admissible in a democracy. The only principle ever adhered to either in theory or practice by the American people has been that of government limited in powers and functioning with the consent of the governed, and it is this principle which is attacked by the eighteenth amendment. This amendment is a fair example of what temporary legislative majorities can do when they exercise plenary power and are allowed to ignore the fundamental rights of citizens. Any legislative act so wholly incompatible with the underlying spirit of our government is entitled neither to the respect nor to the acquiescence of our people.

Intelligent people can no longer be persuaded to obey every piece of fool legislation by saying, "The source of the law is legitimate and therefore every good citizen must obey it passively and without question." This argument was used to uphold the Stuart tyranny and is now being used to lend false dignity to the tyranny of legislative majorities. Indeed, it is very curious to reflect upon the sense of superiority some of us feel when we look back upon certain periods of the past and call them "ages of superstition," forgetting that every age has its own peculiar superstition and that ours is the superstition that law is omnipotent and can work any miracle. Let a reform be suggested, let any large body of people believe that a certain modification of human conduct is desirable, and immediately a hue and cry is raised for legislation! Thousands of crude and irrational laws are turned out by forty-eight legislatures every year. They register the hopes and fears of some enterprising group—

often merely an organized minority. Such statutes are enacted in defiance of the fundamental fact that any law which does not conform to the habits, prejudices, feelings, the general sense of right and wrong in the community must either become a dead letter or a source of perpetual disturbance and anarchy. More than any other cause, this failure of legislators to understand what the true nature of law is, or should be, has brought on the general discredit and disregard for statutory law in America. In so far as such laws stand the test of constitutionality, there is only one corrective process, aptly termed "statutory obsolescence," and without it the United States might be the scene of revolution.

The defects of human nature cannot be corrected by the strong arm of the policeman, nor can virtue and self-denial be brought about by force. All this was foreseen by Herbert Spencer as far back as the middle of the last century, when, in speaking of the effort to reform private character and morals by legislative fiat, he said:

Failure does not destroy faith in the agents employed, but merely suggests more stringent use of such agents or wider ramifications of them. Laws to check intemperance, beginning in early times and coming down to our own times, not having done what was expected, there grows a demand for more thorough-going laws, locally preventing the sale altogether; and here, as in America, these will doubtless be followed by demands that prevention shall be made universal.

Against such legislative atrocities, of whatever character, the jury system has long been the last line of defense. As Mr. Justice Holmes has remarked concerning jurors: "They will introduce into their verdict a certain amount—a very large amount, so I have observed —of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community."

It is certain that the prohibition laws will go the way of all bad laws, but the process will be more painful than usual. A powerfully organized faction bent upon permanently settling a great moral issue by constitutional and legislative action senses that its folly in seeking temperance through this channel may defeat a great cause. It seems to sense that such ill-considered and premature action can only be justified in the end by securing the general acquiescence of the public, and it is bent, therefore, upon obtaining this acquiescence to its own quasi-religious dogmas at any cost to the life, liberty, or property of citizens. That it is actually committed to this plan of action is clearly shown by the recent outrages at home and on the high seas, all committed in the sacred name of prohibition. The issue so boldly pressed must be boldly met.

The Jones law is interesting and important merely as a manifestation of the "do or die" spirit of prohibitors, and it must be immediately resisted by all peaceful means, if only to discourage greater legislative and administrative outrages upon the private lives of citizens. Congress, under the whip of dry organizations, has in effect provided for the disfranchisement of all citizens who do not subscribe to the social, political, and moral opinions of a faction. Every man, woman, or child who either violates the prohibition laws or fails to report known violations to the federal authorities is liable to conviction of a felony, with the resulting loss of all civil rights. These far-reaching consequences become actual possibilities through the conjunction of the Jones law with Section 146 of the United States Criminal Code: the former, by increasing the maximum prison sentence to five years, makes felonies of prohibition violations; the latter imposes upon citizens the duty of reporting known felonies immediately.

In large communities where the prohibition laws are regarded as vicious, violations are constant and open, and

they will continue so because such violations are not looked upon as morally wrong. Citizens of these communities will now be subject to disfranchisement, either for violating the law themselves or for failing to act as "informers." This will doubtless lead to more corruption and blackmail than ever before. It will not, however, induce self-respecting citizens to engage in the dirty business of spying upon their friends and neighbors, sending them to jail simply to justify the blunder of fanatical and self-appointed keepers of our private consciences. Thus vigorous enforcement under the guiding genius of the Anti-Saloon League may—theoretically, at least—transfer from polls to prisons millions of voters whose moral sense is outraged by prohibition. If a way can be found to eliminate jury trials, this will become a very practical possibility.

So long, however, as the jury remains to perform its historic function as the bulwark of civil liberty, the fond hopes of prohibition fanatics are doomed to be disappointed. The severity of punishment made possible under the Jones law will defeat its own purpose. To classify prohibition violations with man-slaughter, embezzlement, white slavery, and seditious conspiracy to destroy the government by force is a monstrous folly; yet this is what the Jones law effects. Seditious conspiracy entails a maximum punishment of only six years' imprisonment and a five-thousand-dollar fine. The Jones laws sets as the maximum penalty for prohibition violation—five years in prison or a ten-thousand-dollar fine. This comparison gives a fair measure of the fanaticism that is abroad in the land. When penalties are so wholly out of proportion to the moral turpitude involved, if any, juries will generally prefer acquittal to punishment. Under the Jones law juries have already begun to demonstrate this.

There is some reason to hope, therefore, that the severity of this atrocity committed in the name of law

may defeat its own purpose; even so, it cannot fail to serve another and better purpose by showing us to what extremes prohibition fanatics will go in violating fundamental human rights. This can best be judged from the words which Senator Jones himself uttered in debate on the floor of the Senate in 1921:

> Another objection that is made to the prohibition law is that it infringes the personal liberties and rights of the individual. This is a very common plea that is made. I have been surprised to hear it made upon the floor of the United States Senate. Mr. President, there is no such thing as personal liberty in a republic.

To the prohibitor, liberty has ceased to exist. He has enthusiastically sacrificed the birth-right of a great people in order to impose his one law upon them. Well may we of this generation ask with Lincoln: "Are all the laws but one to go unexecuted and the government itself to go to pieces lest than one be violated?"

What is to be done? This question is heard upon all sides. There are only three possible courses of action: complete enforcement, repeal of the eighteenth amendment, or obsolescence—sometimes called nullification. The amendment has now been in force for nearly ten years. It has never been enforced—and cannot be! Any serious attempt to enforce it would be met by mob violence, bloodshed, and ultimate failure. As for repealing the amendment, the most optimistic opponent of constitutional prohibition admits that this is practically impossible. The prohibitionists calculated well when they imbedded their futile aspirations in our organic law. Thirteen small states, represented by a few score of legislators, could—and doubtless would—prevent repeal. This alternative may therefore be dismissed—at least for the present.

There remains, then, but one practical course. Sooner or later we shall have to recognize the fact that constitutional prohibition is a folly and a failure; that it can neither be enforced nor repealed; and that there is

nothing shocking, in the light of our own history, in allowing it to sleep peacefully beside the fourteenth amendments and countless other futile expressions of legislative authority. In this state of affairs the most effective soporific would be to repeal the Jones act and its older brother, the Volstead act, thus helping to clear the stage for an intelligent solution of the present impossible situation.

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